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MAHOMEDAN LAW

RELATING TO

MARRIAGE, DOWER, DIVORCE, LEGITIMACY AND GUARDIANSHIP OF MINORS, ACCORDING TO THE SOONNEES.

VOL. III.

ON DIVORCE AND MATTERS RELATING TO DIVORCE.

BY

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PLEADER OF THE CALCUTTA HIGH COURT.

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APPENDIX.

THE TAGORE LECTURES, 1891-92.

BOOK II.

MARRIAGE AND DIVORCE.

PART II.

ON DIVORCE AND MATTERS RELATING TO DIVORCE.

CHAPTER I.

ON IMMEDIATE DIVORCE.

SECTION I.

ON EXPRESS DIVORCE.

1788. (888.) [NOTE.—See Rudd-ool Moohtar, Vol. II, page 680. The meaning of Divorce, according to the Dictionary, is release from Restraint (*kaid*). According to the Shera, Divorce means to remove the restraint or *kaid* of marriage, either immediately by completely separating the wife, or in future by a mode at present revocable—such removal of restraint being accomplished by particular words.]

This book (that is, Part II) consists of several chapters.

1789. (889.) The first chapter consists of several sections.

1790. (890.) The first section treats of express divorce, and of words by which one divorce is effected, or more divorces than one are effected.

1791. (891.) A man says to his wife, "I have divorced thee," or "Thou art divorced," or "I have desired that thou shalt be divorced," or "I have consented to thy divorce," or "I have caused divorce upon thee," or says, "Take thou thy divorce," or says, "I have given thee (or made a gift to thee of) thy divorce," and intends nothing, one divorce is caused (because the words used expressly denote divorce, and therefore whether he intends divorce or not, divorce will be caused): but if he says,

"I have intended thy divorce," divorce will not be caused (because mere intention is an act of the mind, and no words are here used shewing that this intention is meant to be acted up to).

1792. (892.) A woman says to her husband, "Verily so and so has divorced his wife, so divorce me (also)," and the husband says, "Thou art more (completely) divorced than that woman;" then the woman shall become divorced: and so also if he (names the other woman and) says, "Thou art more (completely) divorced than so and so."

1793. (893.) A man says to his wife, with whom he has had intercourse, "Thou art separated, thou art divorced, thou art separated (*bain*)" then if he intends by the use of the first mentioned expression (that is, "Thou art separated") a divorce, then (the whole of) this expression will amount to three divorces: but if he does not, by the use of the first portion of the expression, intend a divorce, then two divorces shall be caused. (Express words of divorce do not require intention to give effect to their meaning, which will be established even if the intention be to the contrary; *e.g.*, where a man intends that by uttering the words "Thou art divorced," there should be no divorce, still divorce shall be caused; so also if he utters them without having any intention at all. See Rudd-ool Moohtar, Vol. II, page 707. Therefore express, or *sureeh*, words of divorce do not require intention to support them. But there are words which, though not primarily designed to denote divorce, still indirectly imply divorce; and therefore they are called Kinayaat-i-Tulak—which are defined by the Shureh-Vekayah in Vol. II, page 54, to be expressions not formed for divorce but capable of meaning divorce and capable also of a meaning other than divorce: these words, therefore, when used may or may not cause divorce: there must, therefore, be an intention—or *neeut*, which is equivalent to *kusd-i-kulub* or mental effort, for which refer to Shureh-Vekayah, Vol. I, page 113,—to cause divorce before they can be accepted as having been used for the purpose of causing divorce; or there must be circumstances or *Dulalut-i-Hal* from which an inference of such intention can be drawn; those circumstances may be either when divorce is the very topic or subject of discourse, or they may be when a man is angry. Thus in the example given in this paragraph, the words used are "Thou art separated or *bain*;" "*bain*" means separate; so that the expression might mean "separate from the marriage" or "separate from goodness," or from anything else: it may mean divorce or it may not: therefore there must be an intention to divorce in order that those words might be received in the sense of

divorce, or there must be circumstances or *Dulalut-i-Hal* to denote such intention. When, therefore, the first portion of the expression is used then, if there is an intention to divorce, that portion of the expression shall cause one divorce; and if there is no intention, then there will be no divorce: the second portion of the expression is express in the matter of divorce, and therefore there will be a divorce, whether there is an intention or not: the third portion of the expression, though not express but merely a *kinaya* or sign of divorce, shall cause a divorce even without any intention, because being used after divorce has been mentioned, there are circumstances or *Dulalut-i-Hal* from which the intention to divorce could be inferred.)

1794. (894.) And if a man says to his wife, "Thou art separated," and the Kazee effects a separation between them (holding that there was a divorce under the law), and the man then says, "I had said to her yesterday 'thou art separated (*bain*),'" then verily shall there be caused the first divorce (which the Kazee has already given effect to), and the second divorce (*viz.*, that which is now admitted by the husband): and the man shall not be allowed to set aside the divorce which the Kazee has caused. (Note.—See Fatawai Alumgiree, Vol. III., page 426, line 14, and page 416, line 10, and Rudd-ool Moohtar, Vol. IV., page 516. Here the principle involved is this: that when witnesses are competent witnesses, *e.g.*, when they are free men and so forth, and the Kazee on the faith of such witnesses has made a decree, after having recourse to all authorised modes for discovering the truth, and such a decree relates to *Ookood, i.e.*, contracts, *e.g.*, marriage or sale, or to *Foosookh, i.e.*, dissolution, *e.g.*, divorce, or *Ikala, i.e.*, annulment of sale, then the Kazee's decree is absolutely binding and is irrevocable. Therefore when the wife, in the instance given in the text, comes to the Kazee and says, for instance, "To-day my husband made me *bain* or separate" and the Kazee makes a decree, his decree is irrevocable; if the husband then comes to have the decree revoked saying, "I did not make the woman *bain* to-day, but yesterday," then a second divorce shall be caused by the admission of the husband that he had divorced "yesterday," in addition to the divorce already decreed by the Kazee.)

1795. (895.) A man says to another man, "Have you divorced your wife," and the man addressed says, "Yes" (or *naam*), spelling the word by its letters (and repeating the letters composing the word instead of pronouncing the word itself) without uttering the word as a whole, or says, "*bula*" (or yes), spelling the word by its letters, without uttering the word as a whole, the divorce shall be caused.

1796. (896.) A man says to his wife, "Every woman that I shall marry is divorced, and you are divorced," his wife shall become divorced at present (*i.e.*, immediately at the moment without waiting for him to marry other wives): and if he says, "I meant by the words ('and you are divorced') that your divorce was dependent on my marrying other wives;" the Kazee shall not accept his explanation. (The expression used might be read in this way—"Every woman whom I shall marry shall become divorced, and then you shall also become divorced," or the expression may mean this—"Every woman whom I shall marry shall become divorced when they shall be married, but you are divorced at the present moment." But the expression, "You are divorced" is coupled with the whole of the preceding sentence and not with the sequence of that sentence, therefore the expression: "You are divorced" has immediate effect).

1797. (897.) And if he says, "Every woman that I shall marry, she is divorced and you (too)," then if he intends that his wife shall become divorced at the present moment, a divorce shall be caused at present, otherwise not. So is it laid down in the Moontuka. (The reason is, that the word "you" is *primâ facie* coupled with the word "she," and therefore the meaning would be—"If I shall marry you, then you are divorced," but she has already been married; and therefore there will be no divorce on her if the sentence be read as conditional: but the expression might also mean "and you are divorced," and this meaning depends on his intention. Therefore if he has the intention of divorcing his wife at present, she shall be divorced at once: otherwise she shall not be divorced at all. Compare paragraph 1560 *post*).

1798. (898.) And if he says, "The woman so and so, whom I shall marry to-morrow, she shall become divorced and you (too);" a divorce shall be caused on his wife (to whom the man addresses himself) at present, and no divorce shall be caused (on the morrow) on the woman whom he shall marry. (If he had said, "Whichever woman I shall marry to-morrow" or "If I shall marry Zynub to-morrow," "she shall be divorced," then, in the event of marriage, the woman, or Zynub, will be divorced; because the divorce must either be pronounced in a marriage state or be referred to the cause of ownership, which is marriage; but the expression in the text is equivalent to his saying "Zynub shall be divorced.")

1799. (899.) And if the man says, "The woman I shall marry to-morrow, she shall be divorced, and you (too),"; then no divorce shall be caused on his (present) wife, until the man marries to-morrow, unless he

has an intention (to cause divorce on his wife at present, and then such divorce shall be caused).

1800. (900.) And if he says, "Every woman whom I shall marry, and my wives are divorced;" then the divorce is effected on his wives instantly.

1801. (901.) And if he says to his two wives, "This is divorced, (and) this (too)," the last word being addressed to his other wife, both of them shall be divorced. And so also if he says, "and this" or "then this" (that is, he says, "This is divorced *and* this" or "this is divorced then this.") And this rule also applies to the case of emancipation. This is stated in the Moontuka.

1802. (902.) A man says in respect to his wife "divorced" (meaning "she is divorced)" without naming the woman, and he has one well-known wife, his wife shall become divorced by way of analogy (*Istihsan.*) And if he (subsequently) says (or explains himself by saying) "I have got another wife and I intended her," his word shall not be accepted (by the Kazee) unless he establishes proof by witnesses (that he had another wife).

1803. (903.) And if a man says, "My wife is divorced," and he has two wives both being well known, it is competent to him to refer the divorce to whichever of the two wives he likes.

1804. (904.) A man says, "I owe to my wife one thousand dirhems," and he has a well-known wife: he then says, "I have another wife and the debt is due to her;" his word shall be accepted (because it is competent to him to explain his liability; but in the case of divorce, his wife, known as such, will be understood to have been meant by him).

1805. (905.) And if he says, "My wife is divorced and I owe her a thousand dirhems:" the divorce and debt shall be referable to his wife who is well known as such, and he shall not be believed if he refers the divorce and the debt to another wife: so also if he commences with property and says, "I owe to my wife a thousand dirhems, and she is divorced" (the debt and divorce shall be applicable to the known wife and the man shall not be confirmed if he says, he meant another wife).

1806. (906.) And so if (having a well-known wife) he says, "My wife is divorced," and then after a short time says, "I owe to my wife a thousand dirhems" (instead of saying, "And I owe to her a thousand dirhems"): and he afterwards says, "I have got another wife and I intended

her;" he shall be confirmed (or accepted) in regard to property, but he shall not be confirmed in regard to divorce.

1807. (907.) And if a man has two wives, and the man has not had intercourse with either of them, and he says, "My wife is divorced, my wife is divorced;" both the wives shall be separated (*i.e.*, shall become irrevocably divorced); and if he says, "I intended only one of the two wives," he shall not be confirmed (by the Kazee; because the husband not having had intercourse with either of them when he had said, for the first time, "My wife is divorced," the result was that one wife became irrevocably divorced, and that wife ceased to be the subject-matter of further divorce; and therefore the second expression cannot possibly apply to the same wife: the second expression must, therefore, apply to the second wife). And so, if he says, "My wife is divorced *and* my wife is divorced."

So also in the case of emancipation (that is, if a man having two slaves, says twice "this is free," both the slaves shall be free, and the man shall not be heard to say that he used both expressions in respect of one and the same slave).

And if the man has had intercourse with both of his wives, and he says, "My wife is divorced; my wife is divorced," it is competent to him to make the divorce fall upon one of them (because when a man has had intercourse with his wife, then he can divorce her thrice before she would cease to be his wife: and the three divorces might be pronounced at once, as when a man says, "I divorce you thrice," when she shall become irrevocably divorced, or he can give her one divorce, and she will then have to observe her *Iddut*, and during the *Iddut* he may give her another divorce, and so a third. But a wife with whom there has been no intercourse, becomes irrevocably divorced by one divorce, and there is no *Iddut* for her. Therefore, when he has had intercourse with her and says, "My wife is divorced; my wife is divorced;" divorce will be caused *primâ facie* on both the wives, but if he makes a statement that he intended to apply the divorce to only one, then that one alone will be twice divorced, as from the time the divorce was pronounced, and not the other one).

1808. (908.) A woman says to her husband, "Divorce me," and the husband says, "I have done so:" the woman shall become divorced. And if the woman then says, "Increase (or enlarge) it to me," and the man says, "I have done so," she shall have a second divorce.

1809. (909.) And if a woman says to her husband, "Give me three

divorces," and the husband says, "I have done so," or he says, "I have divorced thee," she shall be thrice divorced. And if in answer to his wife, he says, "Thou art divorced," or he says, "Then thou art divorced," one divorce shall be caused (because in this last case, the answer does not embody or is not in the terms of the question; whereas in paragraph 908, or in the first case in 909, the answer was in terms of the question).

1810. (910.) A man says to his wife, "Divorce yourself," and the woman says, "I am unlawful to you," or she says, "I am separated (*bain*)," or she says, "I am without you" or "released from you," the woman shall become divorced.

Every word which amounts to a divorce (or is sufficient to cause divorce), when used by the husband, shall, if used by the woman by way of answer, be sufficient to cause divorce.

1811. (911.) A man says to a woman, "Oomrah, the daughter of Soobuh, is divorced," whilst his wife is named Oomrah, but she is the daughter of Hufs, and he has no intention (to divorce his wife by the use of the expression), his wife shall not be divorced.

And if Soobuh is the husband of his wife's mother (that is, the wife's step-father) and the wife is (commonly) spoken of by reference to Soobuh (that is, people call her as the daughter of Soobuh) and the wife is a child in the lap of Soobuh (that is, she is of tender years); and if he (under these circumstances) expresses himself as aforesaid, whether with a knowledge of the wife's parentage or not (that is, whether he knows that his wife is the daughter of Hufs or not), his wife shall become divorced, and he shall not be confirmed by the Kazee (when he says that he knew his wife was the daughter of Hufs and therefore the divorce should not apply to his wife); but between him and his God (that is, morally speaking) the divorce shall not apply to his wife if he knew her parentage (that is, if he knew that she was the daughter of Hufs); and if he did not know her parentage (that is, if he did not know that his wife was the daughter of Hufs) then the divorce shall be caused on his wife also as between him and God (that is, his wife shall become divorced morally speaking, as also in law).

And if he intends to divorce his wife (by the use of the aforesaid expression) then in all these cases (whether the husband knew of the wife's parentage or not, whether Soobuh is the mother's husband or not, whether Soobuh is known to be the wife's father or not, whether the wife is in the lap of Soobuh or not), his wife shall be divorced as between him

and the Kazee (that is in law) and also as between him and God (that is, morally).

1812. (912.) A man says, "My negro wife is divorced" whilst his wife is not of negro origin, the divorce shall not apply to his wife (when the divorce is not addressed in the presence of the wife; but when he says, "This my negro wife is divorced" then she shall be divorced, whether she is a negro or not; because quality or *wusf* is effectual in case of absence, but ineffectual when parties are present).

1813. (913.) And if a man has a wife in possession of her vision, and the man says, "This my blind wife is divorced," pointing to his wife who is in possession of her vision, the wife in possession of her vision shall become divorced, and the mention of the name and quality when (the woman is identified by being) pointed out, counts for nothing.

1814. (914.) A man has two wives, Oomrut and Zynub. The husband (being behind a screen) says, "O Zynub," but Oomrut answers him; he then says (being under the impression that Zynub has answered him) "Thou art divorced thrice (or once or twice)." The divorce shall be effective as against her who answered him, if she is his wife; but if she (who answered him) is not his wife, then what he says is void (and it goes for nothing) because the husband gave utterance to divorce in answer (or reply) to her who answered him: but if he says, "I intended (to divorce) Zynub," then Zynub shall become divorced. But if he says, "Oh Zynub!, thou art divorced," and nobody answers him, then Zynub shall become divorced.

1815. (915.) And if he says to his wife, whom he sees and to whom he points out, "O Zynub, thou art divorced," and the wife addressed is another wife of his, whose name is Oomrut, the divorce shall be caused on Oomrut; the woman pointed out being taken as identified (by the sign) and the mention of the name being considered void (and not taken into account).

1816. (916.) A man says to his wife, with whom he has had intercourse, "When I shall divorce thee, then thou shalt be divorced" (*i.e.*, he made divorce conditional on divorce); he then divorces her: two divorces shall be caused on her (one divorce, involved in the expression "Thou art divorced," shall be caused; and another divorce, which was conditional on a divorce and which depended on this divorce, shall also be caused).

So also (two divorces shall occur) if he says, "*If* I divorce thee"

or "At the time when (or *mata*) I shall divorce thee," or "At the time in which I shall divorce (then, thou shalt be divorced)."

1817. (917.) So also if he says, "Whenever (Koolluma) I shall divorce thee, then thou art divorced," and he then divorces her once, two divorces shall be caused (one divorce caused at present; and the other, which was made conditional).

1818. (918.) And if he says, "Whenever the divorce caused by me shall be caused on thee, thou shalt be divorced;" and he then divorces her once, she shall be divorced thrice (*i.e.*, once on account of the words "thou art divorced"; another divorce on account of the condition relating to the first divorce becoming effective; and a third divorce will also be caused because the second divorce has become effective; and so on a fourth, and a fifth; but three divorces are sufficient to effect a complete separation; therefore the rest are not taken into account).

1819. (919.) A man says to his wife, with whom he has had intercourse, "Thou art divorced; thou art divorced" (without using the word 'and'), two divorces shall take effect upon her, and the husband shall not be confirmed by the Kazee, if he says, he meant by the second expression, simply (a repetition and) information of the first.

So also if he says, "Verily have I divorced thee, verily have I divorced thee" (without using the word 'and'), or if he says, "Thou art divorced, verily have I divorced thee" (without using the word 'and'), two divorces shall take effect. (Compare paragraph 907.)

1820. (920.) And if he says, "Thou art divorced," and then another man or woman asks him, "What did you say," and he answers, "Verily have I divorced her," or says, "I said, she is divorced," only one divorce shall take effect in law and also as between the man and his God (that is to say, the second expression used in the course of the conversation goes for nothing).

1821. (921.) A man says to his wife, "Thou art divorced (*Aammut-ul-Tulak*) by the majority (or larger number) of the divorce," or "by (*Jool-ul-Tulak*) the respectable (number) of the divorce," then two divorces shall be caused. (See Fatawai Alumgiree, Vol. I, page 524, line 20, and Rudd-ool Moohtar, Vol. II, page 742. *Aammut-ul-Tulak* means, the major number of the divorce: divorce consists of three units: one unit is the meanest or the smallest, that is, the lowest number: three units constitute the whole number of divorce, therefore two units constitute the larger or

major number of the divorce. *Jool-ul-Tulak*, similarly means the respectable number: one is the lowest or the meanest number; three is the fullest or largest number, and two is a respectable number).

And if he says, "Thou art divorced (*Kool-ul-Tulak*), every (unit) of the (aggregate number of the) divorce (considered as a whole and a single notion)," then three divorces shall be caused. (See also paragraph 925 *post*. See Rudd-ool Moohtar, Vol. II, page 743, and Fatawai Alumgiree, Vol. I, page 524. *Al Tulak* has two meanings; one meaning is, one certain unit of the divorce, and in this case *Kool-ul-Tulak* would mean every fraction or portion of one divorce, and every fraction or portion of one divorce is only one divorce; and therefore if the husband uses the expression *Kool-ul-Tulak*, the meaning according to this sense would be one divorce, as the Rudd-ool Moohtar points out from the Zakheera and the Bahur-ool-Raik. But the Rudd-ool Moohtar goes on to show that this is a mistaken view, and that the correct view is this; that *Al Tulak* means the divorce recognized by the Shera, and what is recognized by the Shera is divorce consisting of three units; therefore *Al Tulak* or *the divorce* means the notion divorce considered as a whole in the aggregate, and therefore *Kool-ul-Tulak* means every unit of such divorce, and therefore that expression means three divorces: because *Tulak* is the *musdur* or an infinitive word, and applies in its original sense to the real unit or to number one, and it also admits of being used for a unit which is not a real unit, but has merely been assumed to be a unit. The real unit or *Furd-i-Hukeekee* is number one, and the metaphorical or assumed unit or *Furd-i-Hookmee* is number three considered as a unit: therefore when a man uses the word *Al Tulak* only, without any other qualifying or enlarging expression, he *primâ facie* means one divorce only, but he might also mean three, and therefore one divorce shall be caused unless he intends to cause three divorces; in which case, three divorces shall be caused: but when he uses the words *Kool* or *every*, then *primâ facie*, he means three divorces. So also if a man says, "Thou art divorced by the divorce or *Al Tulak*," then one divorce shall be caused *primâ facie*, but if he intends three divorces, then three divorces shall be caused. But if he says, "Thou art divorced by every the divorce, or *Al Tulak Koolluhoo*" then three divorces shall be caused. So also if he uses another infinitive form, *viz.*, *Tutleek* instead of *Tulak*, then the same result follows; but if he uses the word *Tutleekut* with the letter *ta* which denotes one single individual in the real singular number, then only one divorce shall be caused: as for instance, when he says, "Thou art divorced by every portion

of a single divorce or *Kool-ul-Tutleekut*," then only one divorce shall be caused; but if he says, "Thou art divorced every unit of the divorce or *Kool-i-Tutleekutin*" then three divorces shall be caused; because when *Kool* is made *moozaf* to, or is referred to a common noun or *Nukira*, then it embraces every individual member connoted by the common noun: therefore the expression means every unit of the divorce and applies to three divorces).

1822. (922.) And if he says, "Thou art divorced by most of the divorces (*Aksur-ul-Tulak*)," it is said in the Asul (or Mubsoot by Mohamed) that three divorces shall be caused (because 'most divorces' means the greatest number of divorces, which is three. (See Rudd-ool Moohtar, Vol. 2, page 741).

And if he says, "Thou art divorced by the least of the divorce," one divorce shall take effect.

And if he says, "Thou art divorced not the least nor the most," then views differ owing to difference of traditions (from Aboo Huneefa). The lawyer Aboo Jaffer, on whom be peace, says, two divorces shall be caused, and Sheikh-ool Imam Aboo Bakur Mohamed, son of Fuzul, on whom be peace, says, one divorce shall be caused; and the lawyer Aboo Nasur Mohamed, son of Salam, on whom be peace, says, three divorces shall be caused: but the most obvious view is that taken by the lawyer Aboo Jaffer, on whom be peace. (See Rudd-ool Moohtar, Vol. II, page 742 for a discussion as to the reasons in support of the views and which view ought to be considered correct).

1823. (923.) And if he says, "Thou art divorced by numbers" then Ibn-i-Sumaut, on whom be peace, says, two divorces shall be caused.

1824. (924.) And if he says, "Thou art divorced until three divorces are completed." Busheer, son of Waleed, on whom be peace, says, three divorces shall be caused; and that if he intended other than two, he shall not be confirmed by the Kazee.

1825. (925.) And if the husband says to his wife, "Thou art divorced by every portion of a single divorce (*Kool-ul-Tutleekut*)," she shall be divorced once; but if he says, "Thou art divorced by every divorce (*Kool-i-Tutleekut*), she shall be divorced thrice, whether the woman is one with whom the husband has had intercourse or not. (See paragraph 921.)

1826. (926.) So also if he says, "Thou art divorced after every divorce" or "by every (unit) of the divorce" (see paragraph 1064 *post*), or

if he says, "Thou art, with every divorce, divorced," the wife shall be divorced thrice (because after every divorce there is a further divorce and so on *ad infinitum*: but three divorces constitute the highest number).

1827. (927.) And if a man says to his wife, "Thou art divorced with every wife of mine," and he has four wives, all of them shall become divorced. And if in these cases (*i. e.*, in paragraphs 924, 925, 926, and 927) he intended only some of his wives and only some of the divorces (not all the wives or all the three divorces), he shall not be confirmed by the Kazee, but he shall be confirmed (morally) as between him and his God.

1828. (928.) And if he says, "Thou art divorced three halves of divorce," two divorces shall take effect (because three halves mean one and a half; but the fraction shall be completed), but if he says, "Three halves of two divorces," then three divorces shall be caused (because one half of one divorce amounts to one divorce; and half of the other divorce amounts to another divorce, the third half might come out of the first or the second one; but no preference can be given to either, and therefore this half shall be taken to be independent of the other two).

1829. (929.) And if he says, "Thou art divorced by two half divorce," one divorce shall be caused (because two halves of one amount to one).

1830. (930.) And if he says, "Thou art divorced by half divorce, and one-third divorce and one-fourth divorce," then three divorces shall be caused. And if he says, "Half divorce and one-fourth of it and one-sixth of it," one divorce shall be caused.

[Note.—See Rudd-ool Moohtar, Vol. II, page 717 and Fatawai Alumgiree, Vol. I, page 508. A fraction of a divorce is a full divorce, as for instance, where a man says, "Thou art divorced by one divorce" or "by one-thousandth of a divorce," then one divorce shall be caused. Divorce is not susceptible of fractions, and if a fraction is mentioned, then instead of the divorce being negatived, the fraction is completed to a unit, because it is preferable to give effect to an expression than to render it nugatory: the examples in paragraphs 928 and 929 are explained by this rule. *Secondly*,—if the husband says, "One half of a divorce, one-third of a divorce, one-sixth of a divorce" without using the conjunction "and," then only one divorce shall be caused; because the succeeding fractions shall be taken as having been mentioned by way of *Budul* or in substitution of the preceding fraction. *Thirdly*,—if the man says, "One half of divorce *and* one-third of divorce *and* one-fourth of divorce" that

is, he uses conjunctions and refers the fractions to the divorce expressly mentioned, then three divorces shall be caused; because when a common noun is repeated as a common noun, then the second mentioned noun is different from the first mentioned noun, and therefore the "third of divorce" must be understood to refer to divorce different from that of which the half was mentioned before and of which the fourth was mentioned afterwards; in other words, the divorces of which the fractions are mentioned are different divorces, and as fractions of three divorces are mentioned, those fractions must be completed and three entire divorces shall be the result. *Fourthly*,—If the husband says "One-half of the divorce, *and* one-third of IT, *and* one-fourth of IT" that is, he uses the conjunction "*and*" and refers the fraction in the first portion to the "divorce" and in the other portions to the pronoun of the divorce, then the fractions refer to the same divorce; and if the fractions when added together amount to a unit or less than a unit, then one divorce shall be caused; and if they amount to more than one and less than two, then two divorces shall be caused; and if they amount to more than two and less than three then three divorces shall be caused, and if they amount to more than three, even then three divorces shall be caused].

1831. (931.) A man is told that, "So and so has divorced thy wife" or "Has emancipated thy slave;" the man says, "What he has done is good," or "What he has done is bad:" the learned lawyers have differed in this matter: Sheikh-ool Imam, the Great, Aboo Bakur Mohamed, son of Fuzul, on whom be peace, says, divorce shall not be caused in such a case.

1832. (932.) A man says to another, "I have divorced thy wife;" the latter says, "You have done well" (by way of sarcasm) or says, "Thou hast done wrong," these words having been spoken by way of refusal (to accept what he has done as a volunteer), this shall not amount to permission; but if he says, "Thou hast done well, God may bless thee for relieving me of the woman," or says in the matter of emancipating the slave, "Thou hast done well, God may accept this act from thee," this shall amount to permission (or ratification).

1833. (933.) A man says to his wife, "Thou art divorced by the number of the hairs of Satan," one divorce shall be caused (because the rule in a case where the word "number" is referred to a thing—as to which it cannot be positively stated whether the reference is correct or as to which it cannot be negatively asserted that the reference is incorrect—is that only one divorce is caused and the thing referred to will go for nothing: in

the instance given we cannot say whether Satan has hair or not, and therefore only one divorce is caused. And also in the case where "number" is referred to a thing as to which one knows for certain that to refer the "number" to that thing is incorrect, then also one divorce shall be caused, as in the instance given in paragraph 935 *post*, where the reference to the number is inapplicable. And the divorce caused in such cases is, according to analogy from Aboo Huneefa's views, a *bain* or complete and irrevocable divorce; because, although the thing referred to goes for nothing, still the whole of the expression is of greater force than the simple declaration—"Thou art divorced:" but Aboo Yusoof holds that one revocable divorce shall be caused, because the whole of the reference goes for nothing. See Rudd-ool Moohtar, Vol. II, page 744).

1834. (934.) And if he says, "Thou art divorced by the number of * * * * " whilst the woman has applied the depilatory ingredient, and there is consequently * * * *, then Mahomed, on whom be peace, says, no divorce shall be caused just as if he had said "According to the number of hair on the back of (the palm of) my hand," whilst hair has been removed from his hand; (because—see Rudd-ool Moohtar page the same—these are places where hair does grow, and therefore the man shall be considered to have made divorce conditional on there being hair: so that if there is no hair, no divorce shall be caused; but if there is hair, then the divorce shall be according to the number of hair).

1835. (935.) And if he says, "Thou art divorced by the number of hair on the palm of my hand," then (one) divorce shall be caused, and the mention of hair shall go for nothing; because the palm of the hand is not the place where hair grows, contrary to the back of the palm of the hand.

1836. (936.) A man says to his wife, "Three divorces are upon thee:" she shall be divorced thrice (although he does not say, "*I have caused* three divorces on thee").

1837. (937.) And if a man says to his wife, "Thou art divorced once"; and the woman then says (in Persian), "Dost thou wish a thousand (that is, dost thou wish to give me a thousand divorces but expressed in an ambiguous manner so that the expression might mean anything, *e.g.*, dost thou wish a thousand dirhems or any thing else) and the husband says, "A thousand," without intending anything (whether divorce or something else); then the learned lawyers have said that this is nearer to causing a divorce (than not; and three divorces shall be caused).

1838. (938.) A man says to his wife (in Persian), "A thousand divorces for thee I have made into one": the learned lawyers have said that three divorces shall be caused, just as if he had said—"I have divorced thee thrice" at once.

And if he says (in Persian), "At every time, a thousand divorces for thee I make into one" (the declaration being ambiguous, whether he makes it now or will do so in future) and intends thereby to cause divorce (at present): the learned lawyers have said that the woman shall become thrice divorced.

And if he says, "Verily have they given to thee a thousand divorces," this shall not amount to divorce (because the husband himself gives no divorce. See paragraph 1016 *post*).

1839. (939.) And if a man says to his wife (in Persian), "To thee three divorces," three divorces shall be caused as if he had said (in Arabic), "I have given thee three divorces."

1840. (940.) And if he says to her (in Persian), "I have given divorce to thee" (an ambiguous expression which might mean that he divorces her or entrusts to her the power of divorcing herself), then if he intends thereby to cause divorce, the divorce shall take effect; but if he intends to entrust the power of divorce to the wife, divorce shall not be caused; and if he does not intend to entrust to her the power of divorcing herself, this shall amount to causing divorce.

1841. (941.) And if he says to her (in Arabic), "Divorce is for thee" (also an ambiguous expression as in paragraph 940): Aboo Huneefa, on whom be peace, says, if the husband intends thereby to entrust the power of divorce to the woman, he shall be confirmed as between him and his God (*Dyanutun*); so that if the woman stands up in the meeting (implying refusal to accept the authority) the authority to divorce shall become void. And if he does not intend anything, there is no tradition in the matter from Aboo Huneefa, on whom be peace; but it is fit that (in case there is no intention one way or the other) divorce should be caused, and to this effect is the tradition from Aboo Yusoof, on whom be peace (that is, Aboo Yusoof holds that if there is no intention one way or the other, divorce shall be caused).

And if he says (in Persian), "The divorce is to thee," then this amounts to entrusting the woman with authority to divorce herself according to them (all the three Imams).

1842. (942.) And if he says to his wife (in Persian), "On account of defect I have returned thee" and intends thereby divorce, then divorce shall be caused; and if he says, "On account of defect I have returned," divorce shall not be caused (because the expression is ambiguous and it is not certain to whom it applies. See paragraph 1123 *post*).

1843. (943.) A man says to his wife, "Three divorces are upon thee" (as in paragraph 936), she shall be divorced thrice.

So also if he says to his slave, "Emancipation is upon thee," he shall become emancipated.

1844. (944.) And if a man says to another man, "Take this slave in consideration of a thousand," and the other man says, "I have accepted": this shall amount to a sale.

And if a man says to his wife, "Thy divorce is (binding) upon me," it is said in the *Asul* by way of deducing a principle from an illustration—"Dost thou not see that if the husband says 'By God upon me is the divorce of my wife', there is no obligation on the husband" (that is, his saying so amounts to nothing; because, see Rudd-ool Moohtar, Vol. II, page 712, this form of declaration is a formula used in making a vow or *nuzur;* as when a man says, "Upon me is *Huj*" that is, "I make *Huj*, which was simply *moobah* or discretionary, binding on me"; and vows are made in reference to matters of *Ibadut* or religious worship and not in reference to other things: and although divorce does not come within the sense of *Ibadut*, still to divorce, no doubt, is *Hulal*, that is, a free or permissible act, but it is what is called *Abghuz-i-Hulal* in the eye of God, that is, God looks upon the act with condemnation; and being *Hulal* the formula or *Seegha* of *Nuzur* may be used in reference to divorce though without any result).

1845. (945.) The following cases are such that difference exists amongst the learned lawyers regarding the correct rule applicable to them.

A man says to his wife, "Thy divorce is obligatory on me (that is, it is obligatory on me to divorce thee)," or "binding (*lazim*) on me," or "established on me," or "compulsory on me"; some of the learned lawyers have said that in each of these cases one reversible divorce is caused, if the husband has had intercourse with her (for in the case of the wife with whom there has been no intercourse, even a reversible divorce is tantamount to a complete divorce), whether the husband has any intention or not; and some of them have said no divorce shall be caused, even if the husband

intends a divorce by those words; and some of them have said that there exists a difference of opinion, and that according to Aboo Huneefa, on whom be peace, divorce shall be caused by every one of those expressions, and that according to Mahomed, on whom be peace, divorce shall be caused if the husband makes use of the expression *lazim* or binding; and that according to Aboo Yusoof, on whom be peace, it is necessary for the husband to intend divorce in each of these cases (and in that case divorce shall be caused in each of these cases); and Sudur-i-Shuheed has said in the Book on Oaths, in his work called the Shurah-ool Mookhtasur, that the correct principle is, that in none of these cases shall divorce be caused according to Aboo Huneefa, on whom be peace; and he says in his work called the Wakiat that divorce shall be caused in each of these cases: and the lawyer Aboo Jaffer, on whom be peace, says that if the husband makes use of the expression *Wajib* or obligatory, divorce shall be caused on account of popular recognition; and that if he makes use of the expression *Sabit* that is established, or *Furz* that is compulsory, or *lazim* that is binding, divorce shall not be caused on account of the absence of popular recognition of these words in the sense of divorce. (See Rudd-ool Moohtar, Vol. II, page 712, for the reason of the rule and of the difference in these cases).

1846. (946.) A man says to his wife, "Oh, the divorced one," then if she had no husband before, or if she had a husband who is dead but who never divorced her, divorce shall be caused on her; but if she had a husband before and he had divorced her, then if the present husband by the expression used by him did not intend information (of the past), the woman shall become divorced; but if he says, "I intended thereby an information," he shall be confirmed morally as between him and his God; and as regards the question whether the husband will be confirmed by the Kazee traditions have differed; but the correct rule is, that he shall be confirmed by the Kazee; and if he says, "I intended by that expression mere abuse," he shall be confirmed as between him and his God, but not by the Kazee.

1847. (947.) And if the husband says to his wife, "Thou art abandoned" (not using the word divorce), or he says, "I have abandoned thee;" if he intends thereby a divorce, then divorce shall be caused, otherwise not. (The word "*Mootluk*" which has been translated as "abandoned" is a *kinaya* or indirect expression of divorce; therefore intention is necessary).

1848. (948.) If a man says to his wife, "I have given to thee (Aarto

thy divorce by way of a loan:" then according to Aboo Yusoof, on whom be peace, she shall become divorced just as when he says "I have lent thee thy divorce:" and according to Mahomed, on whom be peace, divorce shall not be caused: and according to Aboo Huneefa, on whom be peace, there are two traditions in the matter, (and according to one of those traditions, divorce is caused, and according to the other it is not).

1849. (949.) And the Mashaikhs, on whom be peace, have differed regarding the rule when the husband says to his wife "I have pledged to thee (Ruhunto) thy divorce:" but the correct rule is, that no divorce is thereby caused.

[Note—See Rudd-ool Moohtar, Vol. II, page 714. The word "*pledge*" or Rihn is not a direct expression of divorce and most of the Jurists also hold that it is not an indirect expression or *kinaya* or divorce. Divorce is not caused by the use of that expression, because it does not denote the cessation of ownership. In the Buhur-ool Raik it is laid down that the word is a *kinaya* or sign of divorce, and that if the husband has intention to divorce, then divorce shall be caused. As regards "*wuhubto* or I have made a gift," and "*audato* or I have kept in *wudeeut* or trust," and "*akrazto* or I have lent," these are held by the author of the Buhur-ool Raik to be *kinayaat* of divorce. See Vol. II, Rudd-ool Moohtar, page 766. If a man says "*Baraito*, or I am released from thy marriage," then divorce shall be caused, provided he had the intention, because to get released from marriage is to give up the marriage, and the word is therefore, used as an indirect expression of divorce, in which intention is necessary; but if he says "*Baraito*, or I am released from thy divorce," that means "I have given up the divorce or I will not give divorce," and therefore no divorce shall take place: there is no doubt seme difference on the question. So as regards the words "*Khullaito* or I have set at liberty," or "*Khullaito sabela*," or I have opened the way," or "*Turukto*, I have left," these are indirect expressions of divorce; and if there is intention to divorce, then there shall be divorce, otherwise there shall be no divorce. See Rudd-ool Moohtar, Vol. II, page 767. If a man uses the following words, then one reversible divorce shall be caused, if he has the intention to divorce:—"The divorce is on thee, *i. e.*, *Alaikai*;" "*Wuhubtokai*, or I have made a gift to thee of thy divorce;" "*Baitokai* or I have sold to thee thy divorce," provided the woman says, "I have purchased without consideration;" "*Khoozee*, or take thou thy divorce;" "*Akruztokai* or I have lent to thee thy divorce;" "Verily has God *shaa* or desired thy divorce;" "God has ordered or kaza thy divorce;" "Shaito or I have desired thy divorce]."

1850. (950.) And if he says, "I have set at liberty thy divorce" (that is, I do no longer keep it confined with me) or says, "I have opened the way of thy divorce," or says "I have left (*turk*) thy divorce;" then if the man intends to cause a divorce, divorce shall be caused, otherwise not; (because these are indirect expressions of divorce, and therefore intention is necessary; see pararaph 1110 *post*).

And if he says, "I am released from thy divorce," then the *Mashaikhs* have differed in this matter, and the correct view is that divorce shall not thereby be caused (and even intention to divorce shall not be sufficient, because the expression might mean "I am not agreeable to divorce thee." See paragraph 1114 *post*).

1851. (951.) And if the husband says to his wife, "I have turned away from thy divorce," the divorce shall not be caused (because the expression means "I do not wish to divorce thee)."

1852. (952.) And if a man (having a wife), addresses her jointly with a man, saying, "One of you two is divorced," then, according to Aboo Huneefa, on whom be peace, divorce shall not be caused on his wife, but according to Aboo Yusoof, on whom be peace, divorce shall be caused on his wife.

1853. (953.) And if a man (having a wife), addresses her jointly with a strange woman and says, "I have divorced one of you two," then his wife shall become divorced; and if he says, "One of you two is divorced" and did not intend anything, then his wife shall not become divorced, but Aboo Yusoof and Mahomed, on whom be peace, say that the wife shall become divorced.

1854. (954.) And if the man joins his wife with what is not a fit subject (or *muhul*) of divorce, such as a quadruped or a stone and says, "One of you two is divorced," then according to Aboo Huneefa and Aboo Yusoof, on whom be peace, his wife shall become divorced; but according to Mahomed, on whom be peace, his wife shall not become divorced.

1855. (955). And if the man joins his living wife and his deceased wife and says "One of you two is divorced," his living wife shall not become divorced.

[Note—See Fatawai Alumgiree, Vol. I, page 512. The formulæ "One of you two is divorced" or "This is divorced or this" are in reality forms of *Ikhbar*, *i.e.*, information; that is to say, *primâ facie* they are intended to convey information of an event or of a fact: but those forms are

also used for the purpose of *Insha, i.e.*, creating some new right. When therefore the husband joins with his wife something else, then it must be seen whether that something is at all a fitting subject or *muhul* for divorce, that is, susceptible of divorce. As for instance, when a man says in reference to his wife and a quadruped or a stone "One of you two is divorced" or "This is divorced or this," then here the sense of *Ikhbar* or information is negatived, and therefore his wife shall become divorced even without any intention to divorce. But if he joins with his wife what is susceptible of a divorce, as for instance, when he says, with reference to his wife and a strange woman, "One of you two is divorced," or "This is divorced or this," then the strange woman is a subject susceptible of divorce and the form might be an information as regards the strange woman or, in other words, the intention might be to convey information that the strange woman is a divorced woman: in such a case, if the husband has intention to divorce his wife, then she shall be divorced, and not otherwise. So also if he joins his wife with a man and says, "One of you two is divorced" or "This is divorced or this," then according to Aboo Haneefa, divorce shall not be caused on his wife except when he has the intention to divorce her—because the husband might have used the word "divorced" in the sense that it is the quality of the man in the case and might have intended to convey that he had divorced his wife—but according to Aboo Yusoof the man is not susceptible of divorce, and therefore the rule with reference to the quadruped or the stone would apply, and the wife shall become divorced even without an intention to divorce. But if he says, in reference to his wife and a strange woman, "I have divorced one of you two," then his wife shall become divorced without an intention to divorce. And if he joins with his living wife his dead wife and says, "One of you two is divorced," or "This is divorced and this," then his living wife shall not become divorced—because although the deceased is not now a fit subject for divorce, still the form might have been used to convey an information that the deceased had been divorced].

1856. (956.) And if he says, "So and so is divorced thrice, and so and so is with her;" the latter expression being used with reference to his other wife, both of his wives shall become divorced.

So also if he says, "So and so is divorced thrice" and then afterwards says, "I have rendered so and so a partner with her," each of them shall become thrice divorced.

1857. (957.) And if he says to his four wives, "Amongst you is one divorce," each of them shall have one divorce effective as against her

(because each of them gets one quarter of the divorce; and inasmuch as divorce is not susceptible of fraction, each gets the whole number or one divorce).

So also if he says, "Amongst you are divorces," or says, "Three divorces" or "Four divorces" (each of the four wives shall have one divorce each), unless he intends that a fraction of each divorce shall be on each, in which case (each of the wives having been divorced by a fraction of each divorce, which fraction shall be considered a unity), each wife shall have three divorces.

1858. (958.) And if he says (he having four wives), "Amongst you are five divorces," then on each wife two divorces shall be caused (because each gets one and a quarter but the fraction shall be considered a unity): so also as long as he goes up to eight divorces, and if he goes beyond eight divorces, then each wife shall have three divorces.

1859. (959.) And so also if he says (to his four wives), "I have rendered you partner in one divorce," then this case and the case where he says, "Amongst you is one divorce," stand upon an equal footing (that is, each shall be once divorced).

1860. (960.) [NOTE.—In the Arabic tongue the present tense and the future tense are expressed by the same form, and, therefore, to prevent confusion, the past tense is used when the object is to create a divorce. Therefore if a man intends to say, "I divorce you," he must use the past tense and say, "I have divorced you." But if he does not wish to create a divorce but to give information of a divorce, then the past tense will not do, and the form used is, "I have already divorced" or *Koonto Tullukto*]. A man says, "I have *already* divorced my wife," or "I have already divorced one of my wives;" or says, "I have already divorced my wife called Zynub," or "I have already divorced Zynub," and the fact is that Zynub is at present his wife, the divorce shall (at present) be caused on his present wife, and he shall not be confirmed if he refers the divorce to other than his present wife (that is, he shall not be allowed to say, "I did not mean to cause present divorce on my *wife known as such to the people*, but I intended by using these expressions to cause present divorce to *another* wife, who is not known to the people as my wife):" and he shall not be confirmed in having made the reference to a past tense (that is to say, he shall not be allowed to say, "I did not mean to cause present divorce, but I intended to give information that I had divorced my wife;" he shall

not be allowed to say so; because if he intended to give an information that he had already divorced his wife, then he would have, at the same time that he made the declaration, gone on to explain how the wife still comes to be his wife; and after the declaration his explanation, based upon the reference to the past tense, shall not be allowed).

And if he says, "I have divorced the first woman whom I married," or says, "I have divorced the woman who was my wife," or says, "I had a woman for my wife, and you bear witness that she is divorced:" then in these cases his present wife shall become divorced, except when he admits (by all these expressions) a past divorce in relation to a past marriage, as for instance, when he says, "I have already divorced the *woman who was* my wife," or says, "There *was* a wife to me and I divorced her," or says, "I have already divorced the first woman I married," or says, "I have already divorced *the woman who was* my wife who was called Zynub," or says, "I have already divorced the woman whom I married;" in these cases, the divorce shall not be caused on the woman who is in his marriage, when he says I intended a different woman.

1861. (961.) A man says to his wife, "Thou art divorced three times every year," three divorces shall be caused instantly: and so if he says to his wife on Thursday, "Thou art divorced on Thursday," or says, "Thou art divorced in Thursday," the divorce is caused on her at present.

1862. (962.) A man says to his wife in Persian, "If this year I desire a woman (that is, marry a woman), then she is divorced," and he then marries a woman before the expiry of the month of Zilhij (which is the last month of the year) of this year, then the woman shall become divorced.

1863. (963.) A man divorces his wife and then says to her during the *Iddut*, "Verily have I divorced thee," or says in Persian, "I have divorced thee," another divorce will be caused (before the expiry of the *Iddut*, the relationship of husband and wife is not fully at an end, and, therefore, she could be still further divorced in the case in the text).

And if he says, "I have already divorced thee," or says in Persian, "I have already divorced thee," another divorce will not be caused (because this is information of the past).

1864. (964.) A man says to his wife, "Thou art divorced or not," no divorce shall be caused according to them (the three Imams).

But if he says, "Thou art divorced thrice or not," or says, "Thou art divorced once or not," or says, "Thou art divorced once or nothing," one

divorce shall be caused according to the first view taken by Mahomed and Aboo Yusoof (because the negative applies to the number and not to the fact of divorce); then Aboo Yusoof, on whom be peace, retracted from his (first) view, and said that no divorce shall be caused.

And if he says, "Thou art divorced or nothing," then Aboo Soolaiman, on whom be peace, says, that no divorce shall be caused, and he does not make mention in this matter of any difference: and it is mentioned in the tradition reported by Aboo Hufs that, according to the view of Mahomed, on whom be peace, one divorce shall be caused, and that according to the view of Aboo Yusoof, on whom be peace, no divorce shall be caused. [NOTE.—See Rudd-ool Moohtar, Vol. II, page 725, "Thou art divorced or not," means "Thou art divorced or not divorced," and no divorce shall be caused by this expression, because the *Insha*, or creation of a right, must be with certainty, but here the husband leaves it doubtful whether he causes divorce or not, and therefore there is no *Eekaa*, or causing of divorce. So also as regards "Thou art divorced or nothing," no divorce shall be caused, except according to the view of Mahomed, who says one divorce shall be caused, because according to him the expression has the same meaning as when a man says, "Thou art divorced or there is nothing in the world" but the latter alternative is untrue, and therefore the former alternative must be true, and therefore in the result what remains is the single proposition "Thou are divorced," and therefore one divorce shall be caused; whilst Aboo Yusoof says, "Thou art divorced or nothing" means "Thou art divorced or art nothing" and "nothing" negatives divorce also; therefore the expression means, "Thou art divorced," or "Thou art not divorced-or-anything-else" that is to say, the husband in one part of his speech affirms divorce as regards the woman and in another part of the same speech negatives it; therefore there arises a doubt in the causing of the divorce. Aboo Yusoof's view is based on the rule of jurisprudence that when a common noun, such as a thing, is negatived, then the sense is that of universality or of negativing everything. Again, when the husband says, "Thou art divorced thrice or not," or "Thou art divorced thrice or nothing," or "Thou art divorced once or not," or "Thou art divorced once or nothing;" here the words "or not," "or nothing," refer to the number mentioned which comes to be negatived, and, therefore, what remains is, "Thou art divorced;" because "or" or *au* is a particle of doubt, and the doubt refers to the number: this is the view of Mahomed and the first view of Aboo Yusoof. The second view

of Aboo Yusoof and the view of Aboo Huneefa is, that no divorce shall be caused in the cases mentioned; because when divorce is mentioned with number, then what causes divorce is not the word divorce, but the number; as for instance, when a man says, "Thou art divorced," then divorce shall be caused by the word "divorced;" but when he says, "Thou art divorced thrice," then the divorce is caused by the word thrice. See Aboo Huneefa's view laid down in the Door-ool Mookhtar as on the margin of the Rudd-ool Moohtar, Vol. II, page 749, in the chapter on Divorce of a woman with whom there has not been sexual intercourse. And the illustration of this principle is to be found in a case where a man divorces his wife with whom he has had no intercourse, in which case only one divorce shall make her completely *bain;* but still if a man were to say as regards his wife, with whom he has had no intercourse, "Thou art divorced thrice," the result will be that she shall be thrice divorced, and the man shall not be able to marry her until the legaliser's help is rendered: it is, therefore, clear that the divorce takes place as a consequence of the number and not simply as a consequence of the word "divorced;" and that the word which expresses the number, involves the idea not only of the number but also of the divorce: therefore when doubt is introduced by the use of the word "or," in the instances given above, then no divorce shall be caused. See also paragraph 1052 *post*].

1865. (965.) A woman says to her husband (in Persian), "Give me divorce;" the husband says, "Consider that I have given," or says, "Consider that I have done," or says, "Be it that I have given," or says, "Be it that I have done:" the Mashaikhs have differed in this matter, but the correct view is, that the husband must have an intention to divorce, and that if he intends to cause divorce (*Ekaa*), one reversible divorce shall be caused; but if he does not intend to divorce, no divorce shall be caused (because those expressions of the husband do not necessarily indicate the causing of divorce).

And if the husband (in answer) says, "I have given," or says, "I have done," or says, "It has been given," or says, "It has been done," one reversible (*Rujue*) divorce shall be caused, whether he has intention to divorce or not; and if he says he did not intend thereby a divorce, he shall not be confirmed by the Kazee.

And if the husband says (in answer), "Consider that it has been given," or says, "Consider that it has been done," divorce shall not be caused, although he might have an intention; just as if he had said in Arabic,

"Consider that thou art divorced," when, if he says so, no divorce shall be caused, although he might have an intention (because the fact of her considering herself to be divorced does not make her divorced: he must do something to cause divorce on her).

And if he says (in answer), "Be thou a divorced (woman)," or "Be thou divorced," divorce shall be caused (because here the husband does something to cause divorce on his wife).

1866. (966.) And if a woman says to her husband (in Persian), "Do not keep me," and the husband says, "Consider thyself not kept;" then the learned lawyers have said that, if the husband intended to (*Eekaa* or) cause divorce, divorce shall be caused, otherwise not.

1867. (967.) And if the woman says (in Persian), "Withdraw your hand from me," and the husband says, "Consider that I have withdrawn it," then also if he has an intention to cause divorce, it shall be caused, not otherwise.

1868. (968.) And if the husband says, in the absence of a topic of divorce (in Persian), "It is true that on her, (he) has given a thousand divorces," and he then says he did not intend to divorce his wife, the word to be accepted shall be his (because it is not clear who has given a thousand divorces, and 'on her' does not refer to the wife necessarily).

1869. (969.) And if a man says to his wife, "Thou art not to me a wife," or says, "Not art thou to me a wife," or says, "I am not husband for thee;" Aboo Huneefa, on whom be peace, says, if the husband intends to cause divorce, divorce shall be caused, otherwise not; but his disciples have said, no divorce shall be caused even if he has an intention. (See paragraphs 17 *ante* and 1112 *post*).

1870. (970.) And if the husband on being asked, "Whether he has a wife," says "No:" some of the Mashaikhs, on whom be peace, say, no divorce shall be caused according to the view taken by them (the three Imams); but Kurkhy, on whom be peace, says, that this case also stands with the same difference of opinion as the one above (*i.e.*, the case in the last part of paragraph 969).

1871. (971.) And if the husband says, "By God, thou art not my wife," or says by way of argument, "If thou hadst been my wife (then, &c., &c., *e.g.*, thou shouldst have been under my protection)," or says, "Thou hast not been my wife," or says, "I did not marry thee," no divorce shall be caused even if he has an intention.

1872. (972.) A man says, "Every one of my wives is divorced," or says, "My wife is divorced," this shall not include (or apply to) a woman who (was his wife but who) is observing *Iddut* after a complete (*bain*) divorce. But if he says to such a woman, "Thou art divorced," the divorce shall be caused (if the complete or *bain* divorce already given did not amount to three divorces): so also if he says (in Persian), to a woman who has obtained *Khoola* from him, "This wife of mine is thrice divorced," three divorces shall take effect.

[NOTE.—If a man says to his wife, "I have divorced you once completely or *bain*," which means, "I have given you one irrevocable divorce," then he must marry her again in order to have lawful intercourse with her: if he says, "I have given a reversible divorce," or "Given you a divorce," then a revocable divorce shall be caused, and then the man can have sexual intercourse with her during the *Iddut*, and such sexual intercourse shall amount to a revocation. If he has given her a *bain* divorce, she is not his wife; because if she had been his wife, he could have intercourse with her, and, therefore, when he says, "All my wives are divorced," she shall not be included, and no divorce shall be caused on her; but inasmuch as the *nikah* has not wholly come to an end, because the husband is liable to maintain her, and so forth, he is entitled to treat her as not having gone beyond the relationship of wife, and can pronounce another divorce on her: but if she has already been thrice divorced, then there is no power left in the husband's hands, which he could use for a divorce.]

1873. (973.) A man refers the divorce to certain parts (only) of the woman; then if he refers the same to a part (which is uncertain, and indefinite or) which is not fixed, as for instance if he says, "A moiety of thee," or "A third of thee," or "A fourth of thee is divorced," or "One thousandth part of thee," the divorce shall be caused (that is, a reversible divorce shall be caused); so also if he refers the divorce to a fixed portion which is applicable to (and used to denote) the whole of the individual, as for instance, if he says, "Thy head is divorced," or "* * * (*furj*) is divorced," or "Thy neck is divorced," or "Thy face" or "Thy soul is divorced," or "Thy body," a (reversible) divorce shall be caused; but if he says, "Thy blood is divorced," then, in this matter, there are two (conflicting) traditions: and if he says "Thy belly," or "Thy back," then Sheikh-ool Imam Shumshool Ayma Surukhsy, on whom be peace, says, that according to him, divorce shall not be caused.

And if he refers the divorce to a certain (and definite) part, so that the

whole of the individual is not implied by that part, as for instance, if he says, "Thy hair is divorced," or "Thy chest," or "Thy thigh," or "Thy leg, (or foot)," or "Thy hand," or "Thy anus," or any other like part, then divorce shall not be caused.

And if he says, "This head is divorced," pointing towards the head of his wife, then the correct view is that divorce shall be caused just as if he says, "This thy head is divorced."

And for this reason (that is, because the use of the word "head" is indicative of the whole of the body), if a man says to another man, "I have sold to thee this head for a thousand dirhems," pointing to the head of his slave, and the purchaser says, "I have accepted," the sale shall be valid. (For the reasons of the rule stated in this paragraph, see Rudd-ool Moohtar, Vol. II, page. 714).

1874. (974.) A man says to another, "Inform my wife of her divorce (that is, that I have divorced her)" or "Convey to her the glad tidings (said by way of sarcasm) of her divorce," or "Carry to her, her divorce," or "Inform her that she is divorced," or "Tell her that she is divorced:" the wife shall become divorced instantly, and the divorce shall not depend on her receiving the information (or news of the divorce, or that the husband said so), and shall not depend (in the last case) on the person requested telling her what he was charged with.

And if the husband says to another, "Tell her 'Thou art divorced,'" the divorce shall not take effect until the person requested says so (that is, until he pronounces the very words, "Thou art divorced").

[NOTE.—See Rudd-ool Moohtar, Vol. II, page 789. If a man says to another man, "Authorise my wife to divorce herself;" here the imperative form implies that the husband appoints the other man as his vakeel for the purpose of giving authority to his wife, in the same way as the husband himself could vest her with authority to divorce herself: in such a case, if the vakeel does not vest the wife with authority to divorce herself, she shall not have the authority. But if the husband says to another, "Inform her of her authority," that means, "Inform her that I have vested her with authority to divorce herself," that is, "I have already vested her with authority, and you inform her of this;" here the husband declares that he has authorised his wife to divorce herself. Therefore her authority does not depend on the information to be conveyed by the other; because, even if before the messenger gives her the information, she gets information from other sources, and

divorces herself, the divorce shall be valid. Therefore, arguing from analogy from what is stated above in the Rudd-ool Moohtar, it is clear that in paragraph 974, when the husband says, "Inform my wife of her divorce," this means that the husband has already divorced her and he admits or declares the divorce and wishes the woman to be informed of it; the divorce therefore takes place at once even before the information reaches her; because a divorce takes effect from the time it is given and not from the time the woman hears of it. And so also if he says, "Tell her she is divorced," this means he has already divorced her, and he tells the man to go and tell her. But when he says, "Tell her 'Thou art divorced,'" this means "I appoint you as my vakeel, you should go to her and address her—'Thou art divorced,' and give her divorce:" therefore until the man goes and divorces the woman, there is no divorce; because the husband has given no divorce at all, but has asked another man to give the divorce.]

1875. (975.) And if a person says to another, "Write to her, her divorce (that is, write to her that I have divorced her)," it is fit that divorce should take effect instantly (without waiting for the writing), just as when the man says, "Carry to her, her divorce," and just as when he says, "Write to my wife that she is divorced." (See Rudd-ool Moohtar, Vol. II, page 703: here the husband admits that he has given a divorce and asks another man to write, and, therefore, the woman becomes divorced whether she is written to or not, and whether the writing reaches her or not).

1876. (976.) A man says to his wife, "Thou art divorced like the (*Sanja* or) weight of a Danik:" one divorce shall take effect. And if he says, "Like the *Sanja* of a Danik and a moiety," then two divorces shall take effect.

So also if he says, "Like two dirhems," one divorce shall take effect. And if he says, "Like three dirhems," then two divorces shall take effect.

The result is that, if the man compares the divorce with that which is weighed by one *Sanja* (or a unit of weight) then one divorce shall be caused; but if he compares the divorce with that which is weighed by two *Sanjas* then two divorces shall be caused. And if he compares the divorce with that which is weighed by three *Sanjas* or more, then three divorces shall take effect.

Thus Danik is weighed by one *Sanja* (or unit of weight), and two dirhems are also weighed by one *Sanja*.

And one and half Danik are weighed by two *Sanjas*, and so also three dirhems are weighed by two *Sanjas*. (See Fatawai Alumgiree, Vol. I, page 523).

Accordingly, this class of cases is governed by this rule. (Thus probably, if a man says, "Like eight two-anna pieces," one divorce shall be caused, and so also if he says, "Like two eight-anna pieces:" but if he says, "Like nine two-anna pieces," or "Three eight-anna pieces," then two divorces shall be caused).

1877. (977.) When a man joins (in divorcing) two wives, one of whom is validly married to him and the other is invalidly married, saying, "One of you two is divorced," then the woman who has been validly married shall not become divorced, just as when a man joins a married wife and a stranger, saying, "One of you is divorced;" (see paragraph 953 and 955; but if he says, "I have divorced either of you two," then the wife validly married shall become divorced, because this expression is only *Insha* and not *Ikhbar*).

1878. (978.) And if a man has two wives, the name of each of whom is Zynub, and the marriage of one of them is valid and that of the other invalid (*Fasid*), the husband says, "Zynub is divorced;" the wife whose marriage is valid shall become divorced, and if the husband says, "I intended the other wife (that is, the one not validly married), he shall not be confirmed by the Kazee; just as if a man (having only one wife, whose name is Zynub) says, "Zynub is divorced," the fact being that his wife's name is Zynub, then his wife shall become divorced; and if he says "(by Zynub) I (did not mean my wife, but) intended (to refer to) a strange woman," he shall not be confirmed by the Kazee.

So also if he says, "One of my wives is divorced" (he having two as aforesaid, one of them having been validly married, and the other invalidly married), then the wife validly married to him shall become divorced: (here the expression does not admit of *Ikhbar* and is only *Insha*; see also paragraph 960).

1879. (979.) And if he joins two wives, one of whom has been validly married and the other invalidly married to him, saying "I have divorced one of you two," then the wife validly married shall become divorced; just as if he joins a woman married to him and one who is a stranger to him, saying, "I have divorced one of you two," his married wife shall become divorced. (See paragraph 953.)

1880. (980.) If a sleeper divorces his wife (that is, if a man while asleep happens to utter words of divorce in reference to his wife), and after he awakes he is informed of the fact (that he, while asleep, gave utterance to

expressions of divorce in reference to his wife) and he then says, "I permit (or ratify and confirm) that divorce," the divorce shall not be caused (on his wife).

1881. (981.) So also if a minor divorces his wife, or if a stranger (or a volunteer) divorces the minor's wife, and the minor permits the divorce (given by him whilst a minor or given by the stranger) after attaining majority, (that divorce shall not be caused).

1882. (982.) And if the sleeper (as in paragraph 980), says after he is awake, "I have caused (*auka*) that divorce," or says, "I have rendered it (*viz.*, the divorce given while asleep) divorce," the divorce shall take effect.

So also if the minor (as in paragraph 981) says so after majority (the divorce shall take effect).

[Note to paragraphs 980, 981 and 982. See Rudd-ool Moohtar, Vol. II, pages 699 to 702. The minor being what is called *Muhjoor-an-it-tusurroof*, or having no capacity to act, the divorce given by him has no effect; on the other hand, that divorce is *batil*, that is, it has no existence at all, just as if he had never pronounced the words of divorce: when he attains majority and refers to the same divorce which he had pronounced during his minority, and which had, owing to his minority, no existence and was *batil*, saying, "I ratify that divorce,'" meaning he ratifies a divorce which, in reality, never had any existence at all, even then such divorce shall not be caused; for a thing which is *batil* or which has never had an existence is not capable of being ratified. But if the minor, after attaining majority, says, "I *cause* that divorce," that is, "I cause divorce of the nature or kind such as I caused during minority, but which could not take effect owing to my minority," then the divorce shall be caused; because by the word "that" is meant the kind or "*jins*" of divorce, and not the identical divorce involved in the words uttered during minority: but if he says, "*Aukato al-lazee tuluffus to hoo*," or "I cause that divorce which I pronounced," then no divorce shall be caused; because this divorce refers to the identical divorce which as above stated was *batil*. Just as if a man says to his wife, "Thou art divorced a thousand divorces," and then afterwards he says, not as a qualification of what he had said before, but as a new beginning, "Three of the thousand divorces are upon thee and the rest are on thy co-wives;" here no divorce shall be caused on his co-wives; because when he had caused a thousand divorces on one wife, that wife became divorced by three divorces, and the rest of the number thousand became *batil* and *lagho*; and therefore there was no divorce in existence which could

be caused on the other wives. The case of a sleeper is similar to that of a minor except that a sleeper's words have no effect on account of absence of intention or *intifai-il-iradut*, and the words uttered by him while asleep are *batil:* and it is on account of the absence of intention in a sleeper that his words uttered while in a state of sleep cannot be said to be *sadiq* or true and *Kazib* or false, and cannot be said to amount to *Khubur* or information and *Insha* or creating a thing. Therefore, if after he is awake he refers to the identical divorce which he pronounced whilst in sleep, and which had no existence, the divorce now given shall have no effect, whereas if he refers to what he did in his sleep simply as a reference to the kind or *jins* of *tulak*, then the present divorce shall be caused. So also the divorce pronounced by the following persons shall have no effect:— *viz.*, an insane man or *Mujnoon;* an idiot or *Matooh;* a *Moobursum;* a man who has fainted or *Mooghma alaih;* a *Mudhosh.* A *Mujnoon* or one insane is then defined at page 699. So also a *Matooh* at page 700; a *Moobursum* is one who is affected by the *Birsam* a disease which develops into a hot swelling in the region of the liver and reaches up to and affects the brain; a *Mooghma alaih* is one affected with *Ighma,* which is an affection of the heart or the brain, by which the sense of preception and the power of mobility are rendered useless, and his *akl* or reason remains in a state of torpor; a *Mudhosh* is a person affected so as to make him stare vacantly.]

1883. (983.) A man having two wives says to one of them, "Thou art divorced four times", and she says, "Three divorces are sufficient," and the husband then says, "I have caused the excess on so and so (that is, on the other wife)," then on that so and so no divorce shall take effect (because the excess over three is *batil.* See note to paragraph 982).

So also if the husband says (in reply as aforesaid), "Three divorces are for thee and the remainder is for thy companion," the other wife shall not become divorced.

1884. (984.) A man says to his wife, "Thou art divorced once or twice," one divorce shall take effect, and the husband shall not have the option (to say that by this expression two divorces are effective).

1885. (985.) A man says to his wife, "Verily, God has divorced thee," or says to his slave, "God has emancipated thee" (in the form of a prayer or imprecation): it is said in the Wakiyat, that the divorce shall take effect, whether he (himself as contradistinguished from God) has the intention (to divorce or emancipate) or not, whilst it is said in the Ayeeoon and the Bukkaly, that if the man intends (to give) a divorce, then the

divorce shall be caused, otherwise not. But if he is questioned by another person who asks, "Hast thou divorced thy wife?" and he says (in answer) "God has divorced her," then the divorce shall take effect. So also in the case of emancipation.

[NOTE.—"Verily has God divorced thee," has two meanings in the Arabic language; one meaning is prayer or imprecation, that is, "May God make thee divorced:" if the expression is used in this sense, then there should be no divorce, because the husband does not divorce her himself, but invokes a curse on her: the other meaning is, "I have divorced thee, and because everything done by man is done by God, therefore God has made thee divorced;" this sense requires that the woman should become divorced. Therefore, according to the Ayeeoon and the Bukkaly, when the expression admits of two meanings, the question must depend on intention. The Wakiyat takes the expression in the second sense, and the author of it, therefore, does not hold intention to be necessary. If the expression is used after a question is put, then the woman shall become divorced; because here the second sense only is possible, and it shall be presumed that the husband has used the expression in the sense of *Ikhbar* or information. So also in the case of Emancipation. See also Rudd-ool Moohtar, Vol. II, pages 712 and 713.]

1886. (986.) A man says to his wife in anger or in quarrel (in Persian), "Oh! thou of a thousand divorces, go away. (*i.e.*, Oh, thou divorced a thousand times, or thou a-thousand-times-divorced one, get away)," the woman shall become thrice divorced (although he had not divorced her before, and the expression used shall be considered as divorce). So also if he says, "Oh, thou a divorced (woman)!" she shall become divorced (now, without there having been a previous divorce). And if he says, "Oh, thou a thrice divorced (woman)!" she shall become divorced thrice. (Such expressions are often used in anger or in quarrel; but whenever used they have the same effect).

1887. (987.) And if the husband says to his wife in Arabic, "Go thou a thousand times," having the intention to divorce, the woman shall become divorced thrice (because this expression is an indirect expression, and therefore intention is necessary. See Rudd-ool Moohtar, Vol. II, page 761).

1888. (988.) A man, after having intercourse with his wife, divorces her once, and then after this (divorce) says, "I have rendered the same divorce complete (*bain*)," or "I have rendered that divorce, three di-

vorces:" the traditions have differed in regard to the matter; and the correct view is that according to Aboo Huneefa, on whom be peace, the (single) divorce (given as aforesaid) shall become complete (*bain*), and it shall become (effective in like manner as) three divorces. But according to Mahomed, on whom be peace, it shall not become complete (*bain*), but it shall become (equivalent to) three divorces. And according to Aboo Yusoof, on whom be peace, it is correct to render the (single) divorce, complete (*bain*), but it is not correct to render the same (equivalent to) three divorces.

[Note to 988, 991 and 992. See Rudd-ool Moohtar, Vol. II, page 740. The substance of a thing and a certain quality attached to it must co-exist, or strictly speaking, the conception of the quality is subsequent to that of the substance, although in regard to time both are co-eval. At any rate, when the quality of the thing is sought to be changed, and a new quality is sought to be attached to it, then it is reasonable to suppose that the thing itself came into existence before the new quality could be attached to it. In the instance given in paragraph 988, the husband caused the divorce to come into being with the quality of singleness, or, in other words, with the quality of being reversible attached to it. So that, according to Aboo Huneefa, it is competent to him to change the quality of being reversible into a quality of completeness and being irreversible, or, in other words, to change the quality of oneness into that of being triplicate. So also he might change that quality into a quality of being double. The case is supposed to be that of a woman with whom there has been intercourse, because such a woman requires three divorces to complete her separation, whereas a wife, with whom there has not been sexual intercourse, becomes completely separated only by one divorce, and there is no *Iddut*; and in her case the divorce has done its work and is no longer of any efficacy. It must also be noted that the husband must change the quality of the divorce before the *Iddut* expires; because after the expiry of the *Iddut*, the woman becomes a total stranger, and no divorce can be caused on a stranger; whereas during the *Iddut* of the wife, it is competent to the husband to give a fresh substantial divorce. So also in the case in paragraph 991, the quality of completeness is sought to be attached before the divorce is brought into existence, and therefore such quality shall not be attached to the divorce and the divorce shall be single and revocable. So also in paragraph 992: but if in the case in paragraph 992 the husband had sought to attach the quality of completeness to the divorce after the

woman shall have entered the house, then the divorce shall become complete; because the divorce shall have then come into being as in paragraph 988, See also paragraph 1088 *post*].

1889. (989.) And if a man after having intercourse with his wife divorces her once, and then says during the *Iddut*, "I have rendered obligatory on my wife three divorces with (and inclusive of) that divorce (that is three divorces including the former one)," or says, "I have rendered obligatory on her two divorces with (and inclusive of) that divorce (that is, two divorces including the former one);" then the divorces shall take effect according to what he says (that is to say, in the first case three divorces shall be caused, and in the second case two divorces shall be caused).

But if he says, "I have rendered obligatory on her three divorces," then three divorces shall take effect (the one already given being counted as one); and if he says, "I have rendered obligatory on her two divorces," then two divorces shall take effect (the one already given being counted as one).

1890. (990.) And if a man divorces his wife once, and then revokes the divorce, and then says, "I have rendered that divorce complete (*bain*)," the divorce shall not become complete (*bain*), because the husband is not competent to render the revocation void.

1891. (991.) And if the husband, after having intercourse with his wife, says, "When I shall divorce thee once, then that divorce shall be complete," or "Then that divorce shall be (equivalent to) three divorces," and he afterwards gives her one divorce: he shall certainly be entitled to revoke (that is, his right to revoke shall not be lost to him) and that (single) divorce shall neither become complete (*bain*), nor shall it become (equivalent to) three divorces; because he has attributed the quality of completeness or the quality of the divorce being triple before the divorce had actually come into existence (thus if the man says, "If you enter this house you will become thrice divorced," then on the condition being realised, she shall become thrice divorced; but if he were to say, "If you enter this house you will become divorced" and then says, "I render that divorce complete," she shall become only once divorced, and the divorce shall not become complete, because the quality was attached before the divorce actually took effect).

1892. (992.) And if a man says to his wife, "When thou shalt enter the house then thou shalt be divorced," and afterwards he says before

(the condition was realised, *i.e.*, before) the entry in the house was made by the woman, "I render this divorce complete (*bain*)," or says, "I render this divorce triple," the divorce shall not have attached to it the quality sought to be superadded by him by the additional expression; because the divorce itself was not operative (and, therefore, there is nothing which could be clothed with the additional quality).

1893. (993.) If a man says to his wife, after he has had intercourse with her (in Persian), "One divorce upon thee," "One divorce upon thee," "One divorce upon thee," three divorces shall take effect; just as if he says in Arabic, "Thou art divorced," "Thou art divorced," "Thou art divorced," in which case three divorces take effect: (that is, he repeats the sentences without the conjunction; but the effect is the same as if he repeated them with the conjunction. When a man says "Zaid is standing, Zaid is standing," then the latter is *takeed* of the former: so it might be supposed that where the sentences regarding divorce have been repeated there also it is a case of *takeed*, or repetition so as to add force to the first expression. To guard against this inference, the rule is laid down that such repetitions in cases of divorce have the result not of *takeed* but of *tasees*, that is, of a fresh and additional idea being involved in the sentence which is repeated: such a course is adopted because it is preferable to attach a fresh meaning to an expression than to read it in the sense of a mere repetition. See Rudd-ool Moohtar, Vol. II, pages 747 and 748, and also page 755. Divorce may be given in a form of expression in which the divorce is associated with quality which might be repeated without or with the conjunction, *e.g.*, "Thou art divorced once, once, once;" or "Once and once and once," or there might be a repetition of the word divorce without or with the conjunction, *e.g.*, "Thou art divorced, divorced, divorced;" or "Divorced and divorced and divorced," or the form of expression might be one in which the sentence is repeated, without or with conjuction, *e.g.*, "Thou art divorced, thou art divorced, thou art divorced," or "Thou art divorced and thou art divorced and thou art divorced:" the conjunction used might be "and" or *bul* or *fai* or *soomma*, which also are words of conjunction having the same sense as *and* with a shade of difference in each: in these cases if the woman is one with whom there has not been sexual intercourse, then the first mentioned divorce shall be caused, and she shall become *bain* by that divorce, and there shall be no *Iddut* on her; and there being no *Iddut* on her, and the relationship of husband and wife having been cut off by one divorce, the other divorces shall not be caused; but if

the woman is one with whom the husband has had intercourse, then all the three divorces shall take effect; and if the husband says, "I intended to use the repetitions in the sense of *takeed*," he shall not be confirmed by the Kazee, but he may be confirmed *dyanutun*, or morally, and in conscience, because preference is given to *tasees*).

1894. (994.) And if a man says to his wife (in Persian), "Divorce on thee," or says, "I have given divorce to thee," intending thereby three divorces, his intention is admissible. (See note to paragraph 921. *Tulak* is the *musdur* or the infinitive mood: it is singular in number, and it may mean a real unit, *i.e.*, number one, or it may mean a metaphorical unit, which, in cases of divorce, consists of three in number, because three is the largest number of divorces which it is in the power of the husband to cause on the wife. Therefore when a man says, "Divorce on thee," then *primâ facie* one divorce would be caused; but if there is an intention to cause three divorces, then that intention is admissible; because the word divorce might have been used by him in the sense of a metaphorical unit. It follows from this that the intention to cause two divorces is inadmissible; because number two is neither a real unit nor a metaphorical unit. But if the wife is a slave girl belonging to another person, then, inasmuch as slave wives get completely separated by only two divorces, the intention to cause two divorces is, in her case, admissible, because the number two would then be a metaphorical unit).

1895. (995.) A man says to his wife, "Tivorce on thee" (mis-spelling and mis-pronouncing the word, and using a mistaken letter of a similar sound calling it ت instead of ط), then this incorrect use of the word divorce (*i.e.*, this mis-spelling and mis-pronouncing) might arise in five (different) ways; one of which has just been stated (*i.e.*, where he mis-pronounces the first letter and pronounces Toai, ط, like Tai ت); and secondly, when he (mis-pronounces the last letter using Ghyn غ instead of Qaf ق and) says "Divorgh on thee;" and thirdly, when he (mis-pronounces the first letter which is Toai ط and pronounces it as Tai ت and also mis-pronounces the last letter which is Qaf ق and pronounces it as Kaf ک and) says "Tivork on thee;" and fourthly, when he (mis-pronounces the last letter which is Qaf ق and pronounces it as Kaf ک and) says "Divork on thee;" and fifthly, when he (mis-pronounces the first letter which is Toai ط and pronounces it as Tai ت and also mis-pronounces the last letter which is Qaf ق and pronounces it as Ghyn غ and) says "Tivorgh on thee." It is reported from Sheikh-col Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, that a dis-

tinction shall be made between a man of letters and one who is ignorant (or illiterate), and that if the man is a man of letters, then divorce shall not take effect; (because he would be supposed to have purposely used the wrong word with a motive); but if he is an ignorant man, divorce shall take effect: but he afterwards resiled from this view, saying that divorce shall take effect in all these (five) cases without any distinction whether the man be a man of letters or an ignorant man; because people generally regard all these (five) words as words of divorce, and do not make a distinction between them; and that there are some people who cannot elegantly pronounce words (although they might be men of letters) and who sometimes intend to divorce (by correctly pronouncing the same), but from their lips all this (mis-pronunciation) comes forth in a state of anger and in quarrel: then people asked him what if the man is an Arab; and he said, although he might be an Arab, still the same rule will hold good; because there are some amongst the Arabs who use ک (small Kaf) in the place of ق (big Qaf): and (he went on to say) if the man says, "I intentionally did so, (that is, I intentionally mis-pronounced the word) in order that divorce might not be caused," the man shall not be confirmed by the Kazee, but he shall be confirmed as between him and his God; except when, before pronouncing the word, he cites witnesses, saying to them, "Verily, my wife demands divorce from me, whereas I do not intend to divorce her, and (therefore) I shall pronounce the word in this way (that is wrongly), in order to put an end to the quarrel," and he then pronounces the word in this way (*i.e.*, pronounces it wrongly) and the witnesses hear the mis-pronunciation; so that if the witnesses testify to all this before the Kazee, the Kazee shall not decree divorce.

And from the same Sheikh-ool Imam it is (also) reported that he said people asked my Fatwa regarding a Turk (a man of Turkey), who said to his wife, "Tivorce upon thee (using ت tai instead of ط toai), whilst in the Turkish language, *tulak* with ت (tai) instead of ط (toai) means *spleen*, the husband saying, "I meant spleen by the word, and I did not mean divorce by it," then I said, divorce shall take effect, and the man shall not be confirmed in his explanation by the Kazee, because this mis-pronunciation is such that the same does come out of people's tongue, especially in a state of anger and in quarrel, and that from what is obvious (and clear), divorce shall take effect and the man shall not be confirmed by the Kazee. (See Rudd-ool Moohtar, Vol. II, page 706, where the same matter is discussed).

1896. (996.) A man divorces his wife or emancipates his slave, or

gives him the status of a Moodubhur and uses the Arabic language, but the man does not know Arabic; then if he knows that the expressions used constitute the causing of the divorce or emancipation, but does not know the meaning of the words, then divorce or emancipation shall take effect: and the status of a Moodubhur shall be validly conferred, although he might not know the meaning of the words.

But if he does not know that these words are words of divorce or emancipation, and he has been tutored to say, "I have divorced my wife," or "My wife is divorced," and he accordingly says so, then the same rule holds good, *viz.*, that the divorce or emancipation shall take effect.

And if a man sells using the Arabic language, and he does not realize the meaning of the words (that is, does not know the meaning of the words, and does not know their import, whether they are used for sale or for any other object), the sale and purchase are not valid.

And if a woman is tutored to say, "I have released my husband from the dower," and she says so accordingly, the husband shall not be relieved of the dower: and similar cases are presently, (see paragraph 1748 *post*), to be dealt with (and to be discussed) in the section on *Khoola*, if God so wills it.

[NOTE.—See Rudd-ool Moohtar, Vol. II, page 698, where the case of the husband and of the seller are stated as here, without any reason being assigned for the rule. So also in Futawai Alumgiree, Vol. I, page 498. The reason seems to be this: in the case of sale, there is a consideration and so also in the case of release from dower, and the party must understand precisely what he is about, and what is the effect of his act when it affects property: but in the Arabic language the formula for divorce is the commonest form of speech; and being designed by the Shera to have a particular effect, ignorance of law is no excuse, especially when the result is not so disastrous as in the case of property: if the husband has no intention to divorce, the easiest thing for him to do is to marry again. Compare paragraph 41].

1897. (997.) And if a man says to his wife, "Thou art divorced if God wills (*In-shaa Allah-o-tala*)" and he does not know the meaning of the words "If God wills" (even then, *i.e.*, even if he does not know the meaning of the words "If God wills,") the divorce shall not take effect (as it will not take effect if he knows the meaning of those words), because divorce with these exceptional words used, *viz.*, "If God wills" is void; and the knowledge of the man or his ignorance in regard to the same (that

is, in regard to the meaning of those words), is equal: and this case is compared to the silence of a virgin, when her silence is rendered (and construed into) consent according to the Shera, and no distinction shall be observed regarding her knowledge or ignorance (whether silence is or is not consent; as for instance, a virgin is of age, and her father or grand-father asks her permission to give her in marriage, and she keeps quiet, not knowing that her silence is consent; then her silence shall be taken to amount to a consent on her part, and she shall have no authority to question the validity of the marriage: if the guardian is other than the father, then she must consent in express words: or if there is a minor girl and she is given in marriage by a guardian other than the father or the grand-father, and she knows of the marriage, but does not know whether she has the option of puberty, and on attaining her puberty, she keeps quiet, the marriage shall be valid: if the father or grand-father has given her in marriage, then she is not entitled to annul the marriage on attaining her puberty. See paragraphs 254, 255 and 257).

And this rule is clear when the man (although he does not know the exact meaning of the expression "If God wills," still) knows that the expression "If God wills," if used immediately after the expression of divorce, renders the divorce void (that is to say, if with such knowledge he uses those words, then it is clear that there will be no divorce); but if he does not know this (that the use of the expression avoids the divorce) then (even) the result is the same.

But if the man knows this (that the expression "If God wills," when used after the expression of divorce avoids the divorce) and intends to cause divorce, (without intending to give expression to the words "If God wills,") but the words "If God wills" came from his tongue (or lips), unintentionally, even then divorce shall not be caused. And it is reported from Shuddad, son of Hukeem, that he said that he differed from Khuluf, son of Ayoob, in regard to the rule in this case, he (Shuddad) saying that effect will be given to the words "If God wills," (although uttered by a slip of the tongue) and the divorce ought to become void, whereas Khuluf, on whom be peace, said that the words, "If God wills" were void (as having been used unintentionally by a slip of the tongue) and the divorce was effective; that Khuluf, on whom be peace, said he saw Aboo Yusoof, on whom be peace, in a dream, and that he (Khuluf) said (in his dream) to Aboo Yusoof, that there was a difference between him and Shuddad in the case, and that Aboo Yusoof, on whom be peace, said to him

(Khuluf), "Put your question," whereupon he (Khuluf), put the question, and then Aboo Yusoof said, "The words 'if God wills' will be operative;" that he Khuluf then asked "Why?" and Aboo Yusoof said, "Dost thou (not) see if a man says to his wife, 'Thou art divorced,' but the words 'or not divorced' came out from his tongue, will the divorce take effect?" he (Khuluf) said "No;" and Aboo Yusoof then said, "This is also the result in this case."

[NOTE.—See Hedaya, Vol. II, page 233, where the matter is set out as follows:—"And if a man says to his wife, 'Thou art divorced if God wills,' using the conditional clause (that is, the words 'If God wills') in immediate sequence to (*i.e.*, immediately after) the divorce clause (*i.e.*, 'Thou art divorced' or, in other word, giving utterance to the whole of the expression so as to make the conditional clause follow the divorce clause in an immediate and unbroken sentence and without a stop, so as to make the whole of the sentence operative as one and entire whole, and not with a stop after the divorce clause, the result of which stop would be that the divorce clause would become operative and the conditional clause would then become ineffectual) then the divorce shall not take effect; because the Prophet, on whom be the mercy and praise of God, has said, 'Whoever swears a divorce or manumission (that is, makes it dependent on a condition) and says,—'If God wills' (using the expression if 'God wills' as expressive of condition) using the latter expression in immediate sequence to the former sentence, then he shall not be forsworn.' Another reason is, that the man used the expression 'If it please God' in the form of a condition and, therefore, in this sense (*i.e.*, on account of the form used) that expression (*i.e.*, 'If God wills') becomes a condition on which the divorce clause depends: the divorce, therefore, is one which is negatived (by the man himself) before the realisation of the condition; but here the condition is one which it is impossible for human being to know (that is to say, no man can say whether God has willed the divorce or not); and, therefore, making the divorce conditional upon the will of God is (in reality) to negative the divorce. But (in order that the divorce might be negatived or nullified) it is necessary that the condition should follow the preceding sentence in immediate sequence, like all other conditions, because if the man (after having given utterance to the first part of the sentence) stops, then the preceding sentence becomes operative." See also Rudd-ool Moohtar, Vol. II, pages 841 and 842, where the following instances of the use of *In-shaa Allah-o-tala* are explained. If a man says,

"Thou art divorced if God wills," then divorce will not be caused without any difference of opinion. So also if he uses other expressions of *Istisna* or exception. These expressions, it may be remarked, are called expressions of exception, because the operation of "Thou art divorced" is, that divorce should be caused; but the expression "If God wills" negatives that operation, and excepts it, so as to confine it only in case God wills the divorce. Other expressions of exception are الّا ان or *but that, e.g.*, "Thou art divorced but that God wills انت طالق الّا ان يشاء الله : so also إن لم or *if not:* and إذا or *when:* and ما or *whenever:* and مالم يشاءا or *until not.* Also لَوْلَا or *if not;* as for instance, when a man says, "Thou art divorced *if* thou hadst *no* father لَوْلَا اَبُوكَ ;" here there will be no divorce because she, no doubt, had or has a father: or "*If* thou hadst *no* beauty لولا حسنك " or "*If* I had *not* loved thee لَوْلَا اَنِّي اُحِبُّكِ." The Door-ool Mookhtar says, that the expression سُبْحَانَ اللهِ or *God be praised,* is an expression of exception as Ibn-i-Hummam holds in his Futawa. But the author of the Rudd-ool Moohtar says, the only work of Ibn-i-Hummam, with which he had come across is the Futh-ool Kudeer, which leads to a contrary inference, and that he never came across the Futawa ascribed to Ibn-i-Hummam. The Futh-ool Kudeer says, if a man is made to swear thus وَ اللهِ لَا اُكَلِّمُ فُلَانَةً اَسْتَغْفِرُ اللهَ اِنْ شَاءَ اللهُ or "By God, I will not speak to such and such a person, may God pardon my sins, if God wills;" here "If God wills" is not an exceptional clause, and the oath is binding on him; because the words "May God pardon my sins" intervene between the first expression and the alleged exceptional clause. And the clause "God be praised" stands on the same footing as "May God pardon me for my sins;" and if the latter expression had been an *Istisna,* then the result contended for by the Futh-ool Kudeer in the instance above given would not have followed; because then there would have been an *Istisna, viz.,* "May God pardon me for my sins" immediately following the first expression, and the oath involved in that expression would not, in that case, have been binding. Therefore the expression "God be praised," is not an *Istisna.* The Rudd-ool Moohtar then shews further that, if a man is made to swear to a thing, he might get out of his oath by whispering to himself in a low voice immediately after the oath, the expression "If God wills;" and the way to avoid that is to make the man to take the oath and to go on to say immediately after the oath, the

expression "God be praised," in a loud voice; so that after this even if he were to say to himself "If God wills," the exception could not save him from the consequences of a false oath. If the man joins something else with God and says, "Thou art divorced, if God wills *and* if Zyd wills," "or if God wills *and* if Zyd comes or beats," even then no divorce shall take place; because there are two conditions, and one of them is impossible. If a man says, "Thou art divorced three times *and* three times if God wills," then the woman shall be thrice divorced, as the result of the expression "Thou art divorced three times," and the *Istisna* will apply to the expression "and three times." If he brings the *Istisna* antecedently and says, "If God wills, thou art divorced," then, according to Aboo Haneefa and Mahomed, divorce shall be caused, because they hold that here there are two independent sentences one having no connection with the other: but Aboo Yusoof says, that the second expression is conditional on the first, and therefore no divorce shall take place. Some hold that the views taken by the three Imams are just the reverse of what has been stated above. However, preference is given to the view that divorce does not take place in the case above stated. But if the man says, "If God wills *then* thou art divorced," divorce shall not take place, without any difference, because the use of the word *then* shews that the whole of the expression is a conditional one].

1898. (998.) And Hisham reports from Mahomed, on whom be peace, that where a man intends to say, "For God, I have rendered obligatory on me the fast of one *day*" (a form of oath), but what comes out of his tongue (or lips) is "The fast of one *month*;" then Mahomed, on whom be peace, holds that it is obligatory on him to keep the fast for one month. (If a man expressly uses certain words, those words will have effect given to them quite apart from his intention, except in the case of the insane and the like).

1899. (999.) And if a man intends to say one thing, but by a slip of the tongue he uses expressions of vow (or *Nuzar*, which is usually in the form given in the last paragraph) or divorce, or emancipation; then the lawyer Aboo Jaffer, on whom be peace, says, that in the case of a vow, the subject-matter of the vow becomes obligatory on him, without any difference of opinion; and in case of divorce or emancipation, according to the view taken by Mahomed, on whom be peace, the divorce or emancipation shall be caused; but Aboo Yusoof, on whom be peace, says, that divorce shall not be caused as between the man and his God (although the

Kazee must decree the divorce), but emancipation shall take effect (both as between him and his God and also as far as the Kazee is concerned), and what is reported from Aboo Haneefa, on whom be peace, is the reverse of this, and that divorce shall be caused, but emancipation shall not: but from the sayings of Aboo Haneefa, on whom be peace, what is obvious is that the divorce and emancipation shall (both) take effect, in accordance with the view of Mahomed, on whom be peace.

But if by a slip of the tongue words involving *Koofr* (or infidelism) come to be pronounced, then the man shall not become a Kafir, without any difference of opinion.

1900. (1000.) A man says to his wife, "Thou art divorced in two colors," she shall be divorced twice: and if he says, "Thou art divorced in three colors," she shall be divorced thrice.

[NOTE.—See Rudd-ool Moohtar, Vol. II, page 742: by the mere use of the words "two colors" without any intention, two revokable divorces shall be caused: and if the man uses "three colors," then three divorces shall be caused; and if he uses the Arabic plural and says, "colors," then also three divorces shall be caused. But if he says, "I intended, by the use of the words 'two colors,' two different colors, such as red and green, in or with reference to one and the same divorce," then so far as the Kazee is concerned, this statement of intention shall go for nothing, and two divorces shall still be caused, and the man's declaration that he meant to cause one divorce of two colors shall not be paid heed to].

1901. (1001.) If a man says to his wife, "Thou art divorced, thou," or says, "Thou art divorced *and* thou:" Aboo Yusoof, on whom be peace, says, one divorce shall take effect, but Mahomed, on whom be peace, says, two divorces shall take effect.

And if he says so to two women, adressing them "Thou art divorced (pointing to or looking at one of them), Thou" (looking at or) pointing to the other woman; or saying "*Then* thou;" or saying "*and* thou:" the divorce shall be caused on them (both).

1902. (1002.) A woman says to her husband "Divorce me," but the husband refuses to do so; the woman then says, "Didst thou give?" and the man then says "I gave:" if the expression "I gave" was accompanied with the slightest hesitation (*tasheel*), the divorce shall not be caused.

1903. (1003.) A man says to his wife, "Go thou, a thousand times," intending divorce: she shall be divorced thrice. (See paragraph 987).

1904. (1004.) And if a man says to his wife, with whom he has had sexual intercourse, "Thou art divorced," "Thou art divorced;" two divorces shall take effect.

And if he intends repetition (of one and the same divorce), he shall be confirmed morally (*dyanutun*) and not by the Kazee.

And if he says so to his wife, with whom he has not had sexual intercourse, one divorce shall be caused. (See paragraph 993).

1905. (1005.) And if a man says to his wife, with whom he has not had sexual intercourse, "Thou art divorced once, not (one) but two;" she shall be divorced once (because the first divorce was caused as soon as it was pronounced and therefore it could not be negatived by the rest of the expression).

1906. (1006.) A man says to his wife (in Persian), "To thee divorce," or says "Divorce to thee:" she shall become divorced, and there is no difference in using the word "Divorce" first or last in the expression. (See paragraph 994).

1907. (1007.) And if a man says to his wife in Persian, "I have given thee one divorce" and keeps quiet; and then says, "Two divorces and three divorces:" she shall become thrice divorced, if he so expresses himself after he has had intercourse with his wife.

1908. (1008.) And if the husband says, "To thee one divorce" and keeps quiet, and then after some little time says, "and two divorces:" the wife shall be divorced thrice: and if he says, "Two divorces" without the conjunction, then, if he intended the conjunction, she shall be divorced thrice; but if he had no such intention, then one divorce only shall be caused. (If a man says without interruption, "To thee one divorce and two divorces," then three divorces shall be caused; so also if he omits the word *and* because the use of the word "Two divorces" immediately and without interruption after the first sentence shews that the person referred to in regard to "two divorces" is the "thee" mentioned in the first sentence. If there is interruption, then in the case without the "and," the man's intention must govern the result. See Rudd-ool Moohtar, Vol. II, page 705, where it is stated that it is necessary that the divorce should be referred to the wife; thus, for instance, if the husband says, "If thou shalt go out, then divorce will be caused" and does not go on to say "on thee," then no divorce shall be caused, if the wife goes out. So also divorce shall not be caused if the husband says, "Do not go out except by my order, for I have taken an oath," and the wife goes out.

See also page 714 of the same work, where it is laid down that reference to the wife may be by referring firstly to the whole of her person, or secondly to a certain definite portion of her person such that that portion means the whole of her person, as the head, or neck, or soul, or body, or thirdly to an uncertain and indefinite portion of her person as one-fourth or any other fraction. See paragraph 973).

1909. (1009.) A man says to his wife, "To thee three:" it is said in the Nuwazil, that the woman shall not become divorced; but Sudr-i-Shuheed, on whom be peace, says that, according to him, she shall become divorced.

1910. (1010.) A man says to his wife, "Thou art one," intending thereby divorce, one divorce shall take effect, whether he has pronounced the last letter with the vowel point or not. (See paragraphs 1046, 1067 and 1128 *post*).

1911. (1011.) And if a man says to his wife, "Thou art with three," the topic of discourse being divorce, or he being in a state of anger, she shall become thrice divorced.

1912. (1012.) And if a man says to his wife in a state of anger or in quarrel, "Oh thou of a thousand divorces go away:" she shall be thrice divorced. So also if he says, "Oh thou, a thrice divorced (woman)."

And if he says, "Oh thou, a divorced (woman)," one divorce shall take effect. (See paragraph 986).

1913. (1013.) And if there arises a quarrel between the wife and her husband, and the wife gets up to go out, and the husband says, "Take three divorces along with thyself:" Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says, that if the husband intends to cause divorce, (by the expression used by him) then divorces shall be caused; and if he has no intention whatever, then also, the same (that is, divorces shall be caused) because the expression evidently means an expression by which divorce is caused.

1914. (1014.) A woman says to her husband (in Persian), "Do not keep me" and the husband says, "Consider thyself as not kept" and intends thereby divorce, the woman shall become divorced. (See paragraph 966).

1915. (1015.) And if the woman says to her husband (in Persian), "Give me three divorces" and the man says, "Consider (or take it) that it

has been so said," then the said Sheikh-ool Imam (referred to above), has said that divorce shall not be caused, although he might have an intention. (See also paragraph 965).

1916. (1016.) And if a man says to his wife (in Persian), "They have given thee three divorces:" divorce shall not be caused; because the husband (merely) makes mention of the divorce as having been caused (*Eekaa*) and does not himself cause (*Wukoo*) the divorce. (See paragraph 933).

1917. (1017.) A man divorces his wife; people say to him (in Persian), "Why dost thou not become reconciled" and the man says, "It is not befitting in me (to do so):" this shall not amount to an admission of three divorces, (that is to say, the expression shall not be taken as an admission by him that the divorce pronounced by him was irreversible).

1918. (1018.) A man divorces his wife twice; he then marries her (again) and makes over her dower (relating to the second marriage) to her, and turns her out of his house; then somebody says to him "Why dost thou not bring her back to thy house she being still thy wife, and thou still having one divorce in thy power;" the husband says (in Persian), "Two divorces have already happened and this becomes another divorce" (that is "and here is another divorce:") the said Sheikh-ool Imam Aboo Baker, son of Fuzul, on whom be peace, says, that if he intends thereby (*i.e.*, by the words "and this becomes another divorce") the causing of divorce, divorce shall be caused; and if he intends thereby (Ikhbar or) information (merely of the two divorces already pronounced treating the latter portion as surplusage) then she is (still) his wife as between him and his God, but as far as the Kazee is concerned, another divorce shall (thereby) be caused.

1919. (1019.) A man says to his wife, "Thou art divorced more than one and less than two:" the said Sheikh-ool Imam, on whom be peace, says, that analogy (Kyas) suggests that two divorces shall be caused, but it is mentioned in the work entitled "On differences amongst the learned lawyers" that three divorces shall be caused (two divorces by the first expression which is immediately operative and one divorce in addition to that shall be caused by the second expression, the conjunction *and* having been used. See paragraph 922).

1920. (1020.) A man says, "One wife of mine is divorced," the fact being that he has no wife except one, his wife shall become divorced.

1921. (1021.) A man says to his wife, "Thou art divorced, thou art divorced, thou art divorced" and says, "I intended divorce by the first

expression, and by the second and third expressions I meant explanation for the woman:" he shall be confirmed morally (*dyanutun*), but so far as the Kazee is concerned, the woman shall be thrice divorced. (See paragraphs 919 and 993).

1022. (1022.) A man says to his wife, "Thou art divorced" and says, "By the expression I meant release from restraint (*wisak*):" the man shall be confirmed morally and not by the Kazee; but if he says "By the expression I did not mean release from marriage" (that is to say, he explains his meaning only negatively by declaring what he did not mean, and does not declare positively what he did mean at all, if he did not mean divorce), he shall not at all be confirmed; and (even) if the woman confirms him in this matter, no attention shall be paid to her confirmation.

And if the husband says, "Thou art divorced from such and such act" (that is, thou art released from doing such and such act, using the word divorce for release): she shall become divorced according to the Kazee (because "divorce" in the Shera has a technical meaning).

1023. (1023.) A man is asked by another, "Hast thou a wife other than this wife," and he answers him by saying, "Every wife I have, is divorced:" it is said in the Nuwazil, that his wife shall not become divorced (and present company shall be meant to be excepted, because the sense is that he used this expression to please his wife, and, therefore, she shall be excluded from its operation).

1024. (1024.) A woman says to her husband, "Dost thou wish that I should divorce myself," and the husband says, "Yes;" the woman then says, "I have divorced myself:" the lawyer Aboo Jaffer, on whom be peace, says, that the man's expression "Yes" might imply negation (*Rudd*) that is (he might have meant) "Divorce thyself, if thou hast power to do so;" (that is, thou being a woman hast no power of divorce) or it might imply the giving of authority, and therefore whichever (of the two) he intended, his intention is correct.

1025. (1025.) So also if a man says to another, "Dost thou wish that I should divorce thy wife," and the other man says, (in Persian), "I do wish," or says, (in Persian), "Yes, do give:" this case also admits of two senses (as stated in the previous paragraph).

1026. (1026.) A man says to another (in Persian), "Dost thou wish that I should give divorce to thy wife," the husband says, "I wish," and the man says, "I have given her (that is to say, I give her) *three* divorces."

Some of the Mashaikhs have said, nothing (or no divorce) shall be caused according to the view of Aboo Haneefa, on whom be peace, (because the husband either defied the man, and gave him no authority, or if he gave him authority, that authority was to give not three divorces but one divorce; but inasmuch as the word *divorce* admits in a metaphorical sense of an implication of three divorces, the Vakeel would have authority to give three divorces if the husband had an intention of three divorces, by using the word *divorce*); and this case has been considered equivalent to where a man says to his wife, "Divorce thyself," and the woman says, "I have divorced myself thrice," in which case no divorce shall be caused according to Aboo Haneefa, on whom be peace, (unless the husband had intention of three divorces by the use of the word divorce).

But if that man (in the first case) had said, "I have given her (one) divorce," then one divorce shall take effect. And this answer is correct only when the husband intends to give the other man authority to divorce; but if he intended by the expression, a negation (*Rudd*) of divorce (*i.e.*, if he used the expression by way of defiance) then no divorce shall be caused.

1927. (1027.) A man is known to have been (before) insane, his wife says to him (when he is in his senses) "Thou didst divorce me last night," the husband says, "Insanity had come upon me (last night)" and this (*i.e.*, his having been insane last night) cannot be ascertained except by his word: the word to be accepted shall be his word.

1928. (1028.) And the divorce given by an idiot is ineffectual, like the divorce given by an insane man.

1929. (1029.) And the learned have discussed the distinction between an idiot and an insane: they have said that a lunatic is one whose words and acts are not correct (or straight, *Moostakeem*) unless very rarely (*Nadir*): and that one in his senses (*Akil*) is (just) the reverse of that (*i.e.*, an insane as defined above): and that an idiot is one whose words and acts are mixed, so that sometimes one quality (correctness or quality of being straight) preponderates (*i.e.*, is in existence), and sometimes the other (incorrectness or crookedness) preponderates (*i.e.*, is in existence) and (in the result on the whole) both qualities stand on an equal degree.

And some have laid down that a lunatic is one who does a wrong (*Kubeeh*) act with volition (*Kasd*); and a man in his senses (or *Akil*) is one who (sometimes) does what a lunatic often does, but not with volition (or *Kasd*), and only does it thinking it good (or proper to do): and an

idiot is one who sometimes does what a lunatic often does, but does it with volition, although the reason of the act being bad (*Fasid*) is apparent.

1930. (1030.) A man divorces his wife, he being afflicted with Birsam (a disease which affects the reason); and when he recovers, he says, "Verily did I divorce my wife," and then says, "I was under the impression that a divorce given in that state (of health) was sufficient and effective." Our Mashaikhs, on whom be peace, have said that if, at the time when he makes the admission of divorce, the man refers the divorce to the time of the Birsam, saying, "Verily did I divorce my wife (while I was) in the state of Birsam," then the divorce shall not be caused; but if he does not refer the divorce to the state of Birsam (and merely says, "Verily did I divorce my wife,") then he is bound by this divorce so far as the Kazee is concerned.

And the lawyer Aboo Leith, on whom be peace, has laid down the same view, (even) if the man's admission of divorce is made while the topic of divorce is not going on (but if the topic of divorce is going on, and the matter of divorce is being actually discussed, and he makes the admission of divorce, and refers it to the state of his Birsam, then divorce shall not be caused: but if he does not refer it to that state but simply makes an admission of his having divorced her in the past, then divorce shall be caused. See note to paragraph 982).

1931. (1031.) A man says to his wife, "Thou art divorced once every day and twice every two days:" then on the first day one divorce shall be caused on her and three divorces shall be caused on the second day, if there could be more than three divorces (that is, if it was possible to conceive more than three divorces; because three divorces are sufficient to effect complete separation. The case is this: "Thou art divorced once every day," requires that in two days there should be two divorces, i.e., one divorce each day: and the expression "Twice every two days" requires that there should be no divorce the first day; but that on the second day, there should be two divorces; so that for the two days taken together, there would be two divorces by virtue of the expression last noticed, the result of the whole of the expression, therefore is, that on the first day there is one divorce by reason of the first portion of the expression, and on the second day there is one divorce by reason of the same first portion of the expression and two divorces by reason of the second portion of the expression; altogether there are three divorces on the second day; and those three taken along with one divorce of the first day, give a

total of four, but three divorces being sufficient, two only need be counted of the second day).

1932. (1032.) A man says to his wife, "I have given to thee, the last (of) divorces:" it is said in the *Moontuka*, that she shall become thrice divorced. But if he says, "Thou art divorced, (and art) last (of) divorces," only one divorce shall be caused.

[NOTE.—See Rudd-ool Moohtar, Vol. II, page 743, and Futawai Alumgiree, Vol. I, page 525. When the husband divorces his wife the first divorce is a single divorce, and is the one which is first pronounced; the second divorce also is a single divorce, and it is the divorce which is pronounced after the first divorce; the third or last divorce is also a single divorce, and it is pronounced after the second divorce. Therefore the "last of divorces," is the third divorce, which is pronounced after the second divorce, the second divorce having been pronounced after the first; therefore, when a man says, "I have given thee the last of divorces," this means, "I have given thee three divorces," because although the last divorce is a single divorce, still it is such that two divorces have already preceded it. So also if he says, "Thou art divorced the last of the divorces," three divorces shall be caused. But if he says, "Thou art divorced and thou art the last of divorces," then only one divorce shall be caused, *viz.*, the one involved in the expression "Thou art divorced;" and the expression, "Thou art the last of divorces," must be considered nugatory and inappropriate; because although a divorce might be the last of divorces, but a woman cannot be said to be "the last of divorces;" the single divorce that will be caused in this case shall be a reversible divorce].

1933. (1033.) A man says to his wife, "Thou art divorced *up to* (or *ila*) one year:" then the divorce shall take effect after one year, according to the view of Aboo Huneefa, on whom be peace.

[NOTE.—See Rudd-ool Moohtar, Vol. II, page 721. The particle *ila* or *up to*, is sometimes used in the sense of "after." If a man uses the particle *ila* and intends that the divorce shall be caused after a year, then the divorce shall be caused after a year; therefore the expression used by him means this—"Thou art divorced when a year expires," the divorce being a conditional one. If he intends to cause divorce instantly, but also intends that the duration of the divorce shall be for one year, then the result will be that the divorce shall be caused instantly, and his intention as regards the duration of the divorce shall not be given effect to. If he has no intention at all, then the effect of the expression used by him will be to

cause divorce after one year, according to Aboo Huneefa; but according to Zoofur, the divorce will take effect immediately].

1934. (1034.) A man says (in Persian), to his wife, [whilst the topic of divorce is going on, "A thousand divorces have I put into thy skirt:" she shall become thrice divorced. And if he says, "I did not intend by these words to cause divorce," then his word shall be accepted on his oath.

1935. (1035.) A quarrel ensues between a man and his wife, the woman then says, "Put down three divorces in this place (pointing to a place and implying thereby promptitude), and at the place (pointed out by the woman) there happen to be three small tubes similar to those the weavers use, without thread on them; the man then with the toe of his foot separates one of those tubes (from the others), and says, "This is thy divorce," and then goes on saying the same thing suiting his word to his action in regard to the other tubes, until he separates the (three) tubes from their (original) position; and then says, "Give this to the weaver in order that he might weave it in thy cloth." The learned lawyers have said that it is fit that the man's wife should not become divorced, because (instead of giving divorce) he renders the tubes as divorce.

1936. (1036.) A man says, "The women of the universe or the women of the world are divorced:" his wife shall not become divorced thereby. And if he says, "The women of this town or of this village are divorced," and his wife is also in the town or the village; his wife shall become divorced.

And it is reported from Aboo Yusoof, on whom be peace, that if a man says, "The women of Baghdad are divorced," and his wife is in Baghdad, she shall not become divorced. But Mahomed, on whom be peace, says, that she shall become divorced. (See Rudd-ool Moohtar, Vol. II, page 757. In the case of "universe" and "world," there is no difference of opinion that the wife of the man, who makes the declaration, shall not become divorced; because his wife could only be divorced when he uses the expression in the sense of *Insha*, so far as he himself is concerned; but the expression could not be *Insha* so far as the man is concerned, unless it is so, so far as other men are also concerned, because the same expression could not at one and the same time be used both in the sense of *Insha* and not *Insha*, that is, *Ikhbar*; but universe and world are places so large that it is not possible that the expression could

be used as *Insha* so far as the other men of the world and the universe are concerned, because to be used as *Insha*, in so far as those others are concerned, it must be supposed that they at some antecedent time authorised this man to divorce their wives: and it is impossible to suppose that all the men of the universe and the world should have given such authority to a single individual: when, therefore, the expression is not *Insha* on their behalf, it cannot be *Insha* on behalf of this man also, and, therefore, his wife cannot be divorced. If the man uses the word city, *e.g.*, Baghdad, then, according to Aboo Yusoof, for like reasons, there shall be no divorce, but according to Mahomed, divorce shall take place on the man's wife, because, according to Mahomed, it is possible for all men of a city to authorise the same individual to divorce their wives. If the man uses the word "Kurya" or village, his wife shall become divorced, because the male inhabitants of a village are so few that authority on their behalf is possible to conceive.)

1937. (1037.) A man says to his wife, "Thou art divorced according to the saying of the lawyers," or "according to the saying of the Kazees," or "according to the view of the Moslems," or "according to the Kooran," or "according to the view of so and so Kazee," or "so and so Mooftee:" she shall be divorced so far as the Kazee is concerned (because the Kazee must hold that the words "Thou art divorced" having been used, that is sufficient to constitute divorce, the rest of the expression being treated as surplusage), but she shall not be considered divorced as between him and his God, unless he had the intention. (See Rudd-ool Moohtar, Vol. II, page 756).

1938. (1038.) A man divorces his wife once or twice, and then forgets and fails to find out whether he has divorced her once or twice or thrice; and he then says (in Persian), "The woman is not befitting (*i.e.*, lawful to) me, as long as she has not seen the face of another (that is, until she marries another man);" he then says, that it is lawful to him to marry her (again): the learned lawyers have said, that he shall not be confirmed by the Kazee.

[NOTE.—See Rudd-ool Moohtar, Vol. II, page 745. If the man's doubt arises as the result of his want of memory regarding the question whether the divorce given by him was single or double, then he should proceed according to Aboo Huneefa and Mahomed, on the assumption that he had given her a single divorce, unless his mind preponderates towards the double divorce, and his memory inclines more

towards two divorces than one divorce; so also if the doubt is between two and three divorces. But the second Imam or Imam Sanee, namely, Aboo Yusoof—who is so named to distinguish him from Imam Mahomed, who is called Imam Rubbany, Imam Aboo Huneefa being called Imam Azum—says, that when the doubt refers to the matter whether the divorce pronounced by him consisted of three divorces or less than three, then he shall make *Tuhurry*, or think within himself how in all probablity he had acted; and if he can give preference to one view he shall act accordingly; but if he can give no preference to any view, then he shall act on that which is more severe on himself, that is, he shall act as if he had given three divorces which is more severe on him, because he thereby loses his ownership of marriage altogether].

1939. (1039.) A man is asked (in Persian), "Is this so and so, thy wife?" he says "She is;" then he is asked (in Persian), "Is this thy wife with three divorces?" he says, "She is;" the man says he did not hear the words "With three divorces," but only heard "Is this thy wife:" the learned lawyers have held that he shall not be confirmed by the Kazee in what he says (because he had answered twice and he could not have supposed the second question to be the same as the first; it is therefore clear that the man is shamming not having heard the question which he answered).

1940. (1040.) A man says to his wife, "Say thou, I am divorced:" the divorce shall not be caused as long as she does not say so (and when she says so, she must be supposed to have said so as his *Vakeel*).

And if the husband says to another man, "Say to her, she is divorced," she shall become divorced instantly. (See paragraph 974).

1941. (1041.) A man says to his wife, "Thou, from me art three:" if he intends divorce, she shall become thrice divorced (because "Three" is ambiguous; it might mean three dirhems); and if he says "I did not intend divorce," then if he had made use of the expression ("Thou, from me art three") whilst the topic of divorce was going on, he shall not be confirmed by the Kazee; but if the expression was not made use of whilst the topic of divorce was going on, then the learned lawyers have said we are afraid he shall not (even in this case) be confirmed by the Kazee.

1942. (1042.) A woman says to her husband, "Divorce me," the man points three fingers towards her, intending thereby three divorces: she shall not become divorced until he pronounces the (formula of) divorce. And it is said in the Book on Divorce (in Mahomed's work) that if

a man says to his wife, "Thou art divorced" (which means only one divorce) and points three fingers towards her intending thereby three divorces, and does not give utterance (to the word three) with his tongue, the woman shall be divorced once.

1943. (1043.) A man sees a person and takes her to be Oomra (his wife); he then says, "Oh, Oomra, thou art divorced," without pointing towards that person; the person happens to be other than Oomra, whilst his wife is Oomra: his wife shall become divorced; because when no one is pointed out, regard is had to the name used, and verily the name is found used in this case. (See paragraphs 912 and 915).

1944. (1044.) A man says to his wife (in Persian), "What has divorce done (*i.e.*, has it made you *bain*, &c.) and what not?" his wife shall not become divorced.

And if a man is asked, "Hast thou divorced thy wife," and he says. "Consider her (that is, take her to be) divorced and reckon her as divorced:" his wife shall not be divorced. (See paragraphs 965, 1014, and 1015).

1945. (1045.) A woman says to her husband, "Divorce me;" the man says (in Persian), "Thou art not wife to me:" the learned lawyers have said that by this answer divorce is caused, and intention is not necessary. (Compare paragraphs 969 and 1112 *post*).

1946. (1046.) A woman says to her husband, "Divorce me;" the man says to her, "Thou art single:" she shall become once divorced. (See paragraphs 1010, and 1067 and 1128 *post*).

1947. (1047.) A man divorces his wife, once or twice; his wife's mother then comes to him and says, "Thou hast divorced her, and lost sight of the obligations (thou art under) to her father," reprimanding him for so doing; the husband says, "This is second," (that is to say, in case the divorce already pronounced was a single divorce), or the husband says, "This is third" (that is to say, in case two divorces were already pronounced): another (that is, a fresh) divorce shall be caused (although he has not used the word "divorce.") And if the wife's mother simply reprimands the husband, without making mention of the divorce, and the husband expresses himself as aforesaid, no fresh divorce shall be caused unless there is an intention.

1948. (1048.) A man says to his wife, "Thou art divor ... ... (that is, dropping, or making *Turkheem* in, the last letter of the word *Tálak*),

intending thereby divorce: divorce shall be caused. But if he says, thou art di'ced (that is, dropping the second last letter of the word *Túlak*), no divorce shall be caused, although he may intend to cause divorce, because the suppression of the final letter is habitual with the Arabs (and, therefore, the word with the acknowledged method of mutilation would be taken as fully pronounced; but not so a word mutilated arbitrarily and perversely).

And the lawyer Abool Kasim, on whom be peace, says, that if an Ajumy (that is, a person coming from a country outside Arabia), says this in Persian (*i.e.*, uses the word *Tulak* in a mutilated form along with Persian expressions), and suppresses the final letter, divorce shall not be caused, although he might have an intention, because suppression of the final letter is not habitual in the Ajum country; and that, therefore, if a man says to his slave (in Persian), "Thou art *Aza*, without pronouncing the final letter *dal*, (*i.e.*, mutilating the word *azad* or free), the slave shall not become free, although he might have an intention.

And Sudr-ool Shaheed, on whom be peace, says, that there is no distinction between the Arabic and Persian (expression being used); and that if the man has an intention, then his intention is correct (that is, his intention shall be carried out).

And all this discussion is only when the man uses the word *tal'* (instead of *talik*), without the Kusra on the letter *lam*; but if he uses the word *tal'*, with the Kusra on the letter *lam* (and pronounces it *tali*), divorce shall be caused, although he might have no intention, and the Kusra (or vowel of the letter *lam*) shall supply the place of the final letter.

And this (that is, that divorce shall not be caused by the use of the word *tal'* without Kusra in the absence of intention) is the rule when the husband is not using the word whilst the topic of divorce is going on, and when he is not in a state of anger; but if he expresses himself so (that is, uses the word *tal'* without the Kusra on the letter *lam*) during the topic of divorce or whilst he is in anger, the divorce shall be caused, although he might have no intention.

1949. (1049.) And if a man says, "Thou art *ta* - - - - (di - - - -)," (*i. e.*, mutilating the word divorce so as to drop two final letters of the word *Talik*) and keeps quiet, or somebody stops his mouth (before he has completed the word *talik* or divorced): divorce shall not be caused, even if he has an intention; because it is not habitual to drop (or suppress) two letters of a word. (See paragraph 995).

1950. (1050.) And if a woman says to her husband, "Divorce me," and the husband says "*Daim*" (which literally means "For ever;" but here "*Daim*" is used for "*Dadum*" that is, given), then if he so expresses himself at a place where it is the practice to (mutilate *dadum* into *daim* and to) use *daim* (on such occasions), then divorce shall be caused (and one divorce shall take effect).

1951. (1051.) A woman says to her husband, "How is it that thou dost not divorce me?" and the husband says (in Persian), "Thou art divorced from head to foot:" the learned lawyers have said that if the man intends divorce, then divorce shall be caused, otherwise not. And Maulana (Kazee Khan) says that it is fit that divorce shall be caused whatever be the case (that is, whether the man has intention to divorce or not), because the meaning of the husband's expression is that "Thou art divorced in all thy particles," so that if he expresses himself in this way, divorce shall be caused although he might have no intention (to divorce), just as if he says, "Thou art divorced."

1952. (1052.) A man intends to say to his wife, "Thou art divorced thrice," but after he has uttered (the words) "Thou art divorced," somebody stops his mouth or he dies, one divorce shall be caused (because mere intention unexpressed in words goes for nothing, and the words expressed convey only one divorce). But if he says, "Thou art divorced thrice," and the woman dies after he has uttered "Thou art divorced" and before he says "Thrice," no divorce shall be caused (because when a number is expressed then the number causes the divorce and not the formula or *seegha* which precedes it. See note to paragraph 964). So also if he says, "Thou art divorced once," but the woman is alive only during the time he says, "Thou art divorced," and dies before he says "once:" no divorce shall be caused.

1953. (1053.) A man says to his wife, "I have given to thee (or I have made a gift to thee of) the act of divorcing thyself (*Tatleek*):" this shall amount to vesting her with authority (to divorce herself); and if she divorces herself at the (same) meeting (in which the husband gives her the authority) the divorce shall be caused, otherwise not.

But contrary to that if he says, "I have made a gift to thee of thy divorce:" (she shall be divorced and this shall amount to a divorce caused by the act of the husband): and verily have we discussed this matter. (See paragraphs 891 and 940).

1954. (1054.) When a man (at first) intends to divorce his wife, and

the wife says to him, "Make a gift to me of my divorce," and the man says, "I have made a gift," meaning thereby the abandonment of divorce and refusal of the same: the woman shall continue to be his wife.

1955. (1055.) A man says to his wife, "Thou art divorced, but I shall have the option of three days:" the divorce shall be caused and the option shall be void. (See paragraph 588).

1956. (1056.) A man names his wife as "Divorced," (*i.e.*, gives the name of "Divorced" to her) and says to her, "I have named thee Divorced:" divorce shall not be caused upon the wife, neither morally as between him and his God, nor so far as the Kazee is concerned.

1957. (1057.) A man says to his wife, "Thou art divorced according to the number of the stars," or "according to the number of dust (*toorab*)," or "according to the number of rivers:" the woman shall become divorced thrice. So also if he says, "Thou art divorced like three."

[NOTE.—See Rudd-ool Moohtar, Vol. II, page 743. If the thing mentioned after the word "Number" is such that it is only one in number, such as the sun or the moon, then only one reversible divorce shall be caused according to Aboo Yusoof; as for instance, when a man says, "Thou art divorced according to the number of the sun," or "according to the number of the moon," because the *Tushbeeh* or comparison here goes for nothing, the sun or the moon having no number: but according to Mahomed three divorces shall be caused, because when the word number is used, then the meaning is plurality: and this is the view taken by Shaffae and by Ahmed son of Humbul, whose followers are known as the Humbulees: and according to analogy from the view held by Aboo Huneefa, one *bain* or irreversible divorce shall be caused, because by the mere expression, "Thou art divorced," one reversible divorce is caused, and when *Tushbeeh* or words of comparison are used, then the use of those words requires accession of strength to the divorce. See note to paragraph 933. If, after the word "Number," a thing is mentioned which is a collective term and is used to denote quantity, large or small, such as water, or dust, or honey, then the result is the same, *viz.*, according to Aboo Yusoof, one reversible divorce shall be caused, and according to Mahomed three divorces shall be caused, and according to Aboo Huneefa, one irreversible divorce shall be caused. And if after the word "Number," a thing is mentioned which denotes at least three or which must consist of, at least, three particles, such as sand, *i.e.*, *Rumul*, which implies at least three particles of sand,

or *Tumur*, *i. e.*, date, which implies three date fruit, then according to all the three Imams three divorces shall be caused. If the man says, "Thou art divorced like the sun, or like the moon, or like the water, or like the dust or like the honey," then, according to Mahomed, one reversible divorce shall be caused, because the word "Number" is not mentioned; and according to Aboo Yusoof also, one reversible divorce shall be caused; but according to analogy from the view of Aboo Huneefa one irreversible divorce shall be caused. And the expression, "Thou art divorced *according* to the number of the sun" has the same effect as the expression, "Thou art divorced *like* the number of the sun," the former means comparison though the word "like" is unexpressed. See also paragraph 1143 *post*].

1958. (1058.) And if he says, "Thou art divorced once, like three," one complete (*bain*) divorce shall be caused (whereas if he had said, "Thou art divorced" or "Divorced once," then one reversible divorce would have been caused; three divorces make the wife wholly *bain* or separate, so that she cannot be married again to the same husband without the legaliser. "One divorce like three" makes her *bain* or separate, but still the husband can marry her without the aid of the legaliser. See also paragraph 1143 *post*).

1959. (1059.) And if he says, "Thou art divorced like the pillars" or "like the mountains" or "like the rivers," then one complete (*bain*) divorce shall be caused according to Aboo Haneefa and Zoofur, on whom be peace, (see paragraph 933 and note thereto); but Aboo Yusoof, on whom be peace, says, one reversible divorce shall be caused (because he says the quality expressed is inappropriate to a divorce, and therefore the quality goes for nothing).

And this class (of cases) will be discussed in the section dealing with Similitudes (or comparison), if it pleaseth God. (See the Chapter on Zihar which, though headed as such, in reality consists of comparisons, and see paragraph 1853 *post*).

1960. (1060.) A man says to his wife, (even) before having intercourse with her, "Thou art divorced one (*Ihda*) and twenty:" she shall be divorced thrice according to us (that is according to Aboo Huneefa and his two disciples); but Zoofur, on whom be peace, says, that one divorce shall be caused. And if he says "Once (*Wahidatoon*) and twenty" or "Once and a thousand," then one divorce shall be caused according to their view (that is the view of all the three Imams and also of Zoofur) except-

ing one tradition from Aboo Yusoof, on whom be peace (according to which three divorces in this case shall be caused).

And if he says "One (and) ten" she shall be divorced thrice. And if he says "Once and ten" she shall be divorced once.

[NOTE.—If a man has intercourse with his wife, and afterwards he divorces her once, the woman's *Iddut* commences, and during the *Iddut*, he can pronounce two other divorces on her. If he has not had intercourse with her, and pronounces one divorce on her, she becomes separate, and it is not necessary for her to observe any *Iddut*, and, therefore, she is not a fit subject on whom to pronounce a second and a third subsequent divorces; but if he says, "Thou art divorced thrice," then three divorces shall be caused. In all the instances given in the text, if the husband has had intercourse with the wife, then three divorces shall be caused. But if he has not had intercourse with her, and he says, "One *and* twenty," then according to Aboo Huneefa and Aboo Yusoof and Mahomed the expression means "Twenty-one," and therefore three divorces shall be caused without regard to the conjunction; but Zoofur says effect must be given to the conjunction; and inasmuch as she becomes separate by the single divorce involved in the word "One," the rest of the expression goes for nothing: but if he uses the expression "Ihda Ashara," *i. e.*, one, ten that is eleven, then, according to all, three divorces shall be caused, the reasoning of Zoofur not being applicable, because there is no conjunction here between one and ten, although the expression does mean one and ten that is eleven. And if he says, "Once and twenty" or "Once and ten" then one divorce being sufficient, one divorce shall be caused, and the rest of the expression shall go for nothing].

1961. (1061.) A man says to his wife, with whom he has had intercourse, "Thou art divorced;" the woman says, "It does not suffice me with one;" the man says (in Persian), "Catch (or take) two;" then if he intends (by the "two") the causing of divorce (and does not mean anything else), the woman shall be divorced thrice; (if he means by the expression, "Catch or take two," that she is at liberty to consider as two the one divorce pronounced by him, then this expression goes for nothing; because one divorce cannot become two unless two divorces are actually given; but if by the expression he means to cause two divorces, then two fresh divorces shall be caused in addition to the one already pronounced, which is beyond recall).

1962. (1062.) A man says to his wife, "If thou be my wife, then

thou art divorced thrice: " the learned lawyers have said that if he does not immediately give her one complete (*bain*) divorce after giving expression to the vow (or conditional sentence stated above), the woman shall be thrice divorced.

[NOTE.—See paragraph 1256 *post*. The woman is, in reality, the man's wife, and, therefore, the conditional divorce must have its operation unless the husband can manage to render the condition ineffectual, and that could be accomplished by making her cease to be his wife before the declaration is effective. When, therefore, the husband, immediately after giving expression to the conditional declaration and before the same becomes operative, says, in the same breath without a stop, " Thou art divorced *completely*," then the woman ceases to be his wife, and the triple divorce involved in the conditional declaration becomes ineffectual. The conditional declaration becomes operative if the husband should come to a stop after the declaration, but if without coming to a stop he adds an expression by which the woman ceases to be his wife, then he renders the conditional declaration nugatory. If the conditional declaration becomes effective, then the husband cannot re-marry the woman unless by the aid of the legaliser; but by adopting the device here set out, he can marry her immediately, because only one divorce is pronounced in the device: if in the device the husband only says, " Thou art divorced," then if the woman is one with whom the husband has had intercourse, the device cannot be successful, because the woman will have to observe her *Iddut*, and before the expiry of the *Iddut*, the relationship of husband and wife continues to a certain extent, and the conditional declaration shall come into operation; but if the husband has not had intercourse, then she is not obliged to observe her *Iddut*, and the divorce in the device shall not be *Rujue* or revocable, but it will be *bain* or complete even without the husband making use of the word *bain* or complete].

1963. (1063.) A man says to his wife, " Thou art divorced with every drink (that is, every time that I drink): " she shall not be divorced until he drinks.

1964. (1064.) And if he says, " Thou art divorced by every (unit) of the divorce," and this is said after the man has had intercourse with his wife: she shall become instantly divorced thrice. (See paragraph 926; but if the husband has not had intercourse with her, then she shall

become *bain* or completely separate by the expression, "Thou art divorced," and the rest of the expression shall go for nothing).

1965. (1065.) A man has daughters who have their husbands; the husband of one of the daughters says to the father (in Persian), "I have given one divorce to thy daughter:" the divorce shall be caused on the wife of the giver of the divorce (and the words "thy daughter" would refer to the speaker's own wife).

1966. (1066.) A man says to his wife, "To thee, one," or says, "To thee, three:" Suddr-ool Shaheed, on whom be peace, says, the woman shall be divorced once or thrice (as the case may be, provided there is something in the surrounding circumstances to make the speech referable to divorce and not to other matters).

1967. (1067.) And if the man says to his wife (in Persian), "Thou art one," or says, "Thou art three:" Abool Kasim, on whom be peace, says, no divorce shall be caused. Kazee Khan, on whom be peace, says, it is fit that the effect of the expression should depend on circumstances; and that if the man so expresses himself whilst the topic of divorce is going on, or when the husband is in a state of anger, then divorce shall be caused; otherwise no divorce shall be caused, unless there is intention; just in the same way as if the man says in Arabic, "Thou art one (or single)."

1968. (1068.) And if the husband says (in Persian), "This wife, who is mine, is with three:" Aboo Nusar Duboosy, on whom be peace, says, no divorce shall be caused; and Aboo Bukr Ayazy, on whom be peace, says, that if the husband has the intention to divorce, then there shall be divorce.

And if he says to his wife (in Arabic), "Thou art with three:" then Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says, if the husband has an intention, then divorce shall be caused.

1969. (1069.) A man says to his wife (in Persian), "I have withheld my hand from thee, by (giving thee) one divorce" (see paragraphs 1131 and 1135 *post*); and the woman says, "Say again, so that witnesses might hear;" and the husband says, "I have withheld my hand from thee, by (giving thee) one divorce;" then, when the husband and wife separate (that is, go about their business), a strange woman says to the husband (in Persian), "Hast thou withheld thy hand from thy wife," and the man says, "I have withheld my hand from her, by (giving her) one divorce:" the learned lawyers have said that, if the husband has

said a second time and a third time, "I have withheld my hand," (as he says a second and a third time as aforesaid), this shall be the creation (or *Insha*) of fresh divorces (with each expression), and the woman shall be divorced thrice, unless he says, "I intended by the second and third expressions (mere) information (or explanation)."

And if he says (the second and third time), "I have *already* withheld my hand," this shall be information (or explanation of the first divorce and shall not amount to fresh divorce).

1970. (1070.) A man says to his wife (in Persian), "Do thou remain with three divorces:" if he intends thereby the causing of divorce, this shall amount to divorce, otherwise not; because this expression is ambiguous, and it might mean that he intends thereby that, "Thou with three divorces art my property" (that is, he intends to state what is a fact, *viz.*, "I have the power of three divorces and thou remain with me whilst I possess the power of three divorces)." Intention is therefore necessary, (because the expression is susceptible of this meaning *viz.*, "I have caused three divorces be thou with three divorces)." So also if he says (in Arabic), "Thou art with three divorces;" this also admits of the same meaning (that is, that "I am the owner of three divorces"), except this, that this expression is mostly used for the purpose of causing divorce; so that if it appears that the man intended thereby (to express) his proprietorship in the wife, then divorce shall not be caused.

1971. (1071.) A man says to his wife, "Thou art divorced so many, so many:" she shall be divorced thrice; because the expression (*Kuza* or) "so many" is used for numbers, and the least number which is expressed without a conjunction is eleven (which is expressed by one, ten; that is, one and ten—see note to paragraph 1060): the woman, therefore, shall be thrice divorced.

1972. (1072.) A man says to his wife, "I hold thee abominable as one does the saliva (or phlegm which he expectorates to spit out of his mouth);" the woman then says, "If thou hold the same in abhorrence then cast it away;" the husband then says, "Thoo, thoo" (making a sound similar to that made in the act of spitting), throwing out the saliva, and says, "I have cast it away," and intends thereby divorce: the woman shall not be divorced; because even if he vomits and intends divorce thereby, the woman shall not be divorced, so also if he throws out the saliva and intends divorce thereby (divorce shall not be caused).

1973. (1073.) A man is addressed by another, "Hast thou married another wife," and he says "Yes;" he is then asked (by the other) "Why didst thou divorce the first?" he then says in Persian, "For thee;" the fact being that he did not marry another wife and did not divorce the first wife, and did not intend divorce by his words: his wife shall not be divorced.

1974. (1074.) A woman says to her husband, "Divorce me thrice;" the husband says, "This time, a thousand divorces:" his wife shall not be divorced, because the expression is ambiguous; (it might mean, "Dost thou ask a thousand divorces at this time," or it might mean, "This time I give a thousand divorces:" the expression being ambiguous, if he has the intention to cause divorce, she shall be divorced).

1975. (1075.) A man says to his wife, "Do not go out of the house without my order, because I have made a vow regarding divorce (that is to say, the vow was that divorce would be caused by her going out of the house without orders);" the woman goes out of the house without his order: she shall not become divorced, because he did not say that the vow he made was with regard to this woman's divorce, and it might be that the vow referred to the divorce of some other woman. The word to be accepted shall, therefore, be that of the husband; (that is to say, if, in such a case, the woman takes proceedings before the Kazee, and says, "I am divorced," but the husband says, "She is not divorced because the vow referred to the divorce of another wife," then the husband's word shall be accepted).

1976. (1076.) A man has four wives; he says to one, "Thou art," and to another, "Then (or *Soomma*) thou art," and to a third, "Then (or *Soomma*) thou art," and to the fourth "Then (or *Soomma*) thou art divorced:" the fourth wife shall become divorced; because he rendered "Divorced" as the quality of the fourth wife.

[NOTE.—Here the word, then or *Soomma*, prevents the word "Divorce" from being applicable to the first three wives, because the effect of the word *Soomma* or *then* is to disjoin the sentences, although the sentences might have been pronounced immediately one after the other: if instead of *Soomma* or *then*, he had used the conjunction "and," and pronounced the sentences continuously without a break, then all four would have been divorced; but if using the word "and," he had broken the sentences and taken a pause after each sentence, then the divorce would have been applicable to the fourth: the effect of the word *Soomma* or *then* is this, that the mere use

of that word is to disjoin the sentences and introduce a break, although there might not be a break in the speech as a matter of fact: the import of the word "*Soomma* or then" is distinguished in jurisprudence from the meaning of "and" in the way pointed out above].

1977. (1077.) A man says "Divorced," and he is then asked "What woman dost thou mean;" he says, "My wife:" his wife shall become divorced.

1978. (1078.) A man says, "A woman is divorced," or says, "I have divorced a woman thrice," and he says, "I did not mean thereby my wife:" he shall be confirmed in his statement.

But if he says, "Oomra is divorced," his wife's name being Oomra; and he says, "I did not mean my wife:" his wife shall become divorced, and he shall not be confirmed by the Kazee (when he says he did not mean his wife).

So also if he says, "The daughter of so and so is divorced," naming the father, but not naming the woman herself, and (the fact is that) his wife is the daughter of that so and so; but he says, "I did not mean my wife:" he shall not be confirmed in his statement by the Kazee, (although his father-in-law might have several daughters) and his wife shall become divorced, in the same way as if he had mentioned the name of his wife.

And if he says, "Oomra is divorced," and his wife is "Oomra:" then his wife shall be divorced, and he shall not be confirmed by the Kazee in withdrawing the divorce from her.

So also if he does not describe his wife with reference to her father, but with reference to her mother or her child: his wife shall become divorced.

So also if his wife's mother catches hold of him and says, "I shall not leave thee to go on thy journey until thou divorce my daughter;" the husband then says, (in Persian), "Three divorces on thy daughter;" he then says, "I did not intend my wife:" his wife shall become divorced so far as the Kazee is concerned.

1979. (1079.) A man says to his wife in anger (in Persian), "If thou my wife, three divorces," suppressing the word "art:" his wife shall not be divorced, because he did not refer the divorce to her.

1980. (1080.) A man, in whose presence there is a woman covered over, is asked, "Is this covered woman thy wife," and then he is

asked "take an oath (and say), if thou hast any wife excepting this woman (she is thrice divorced);" the man then takes an oath with three divorces that he has no other wife except this one (that is, he takes an oath saying "If I have a wife except the one present, then she is divorced thrice);" the fact is that the woman covered over is a stranger to him (and he has a wife at home): the learned lawyers have differed regarding this matter; but the Futwa is, that his wife shall become divorced so far as the Kazee is concerned.

1081. (1081.) And so if a man marries a woman at Balkh, and the woman goes without his knowledge to Tirmiz; he then takes an oath and says, "If he has a wife at Tirmiz, then she is divorced:" his wife shall become divorced (although he is ignorant that his wife is at Tirmiz, and although so far as his knowledge goes his wife is at Balkh).

1082. (1082.) A man eats bread and drinks wine; he then says (in Persian), "We have eaten bread and drank wine, our wives with three;" then after the man stops, another man says to him "With three divorces," and the (first mentioned) man says, "With three divorces:" his wife shall not become divorced, because when the man finished his speech and stopped a while, then this expression (that is, "With three divorces,") becomes a fresh expression in which there is no reference to anybody.

1083. (1083.) A man says to his debtor, "Thy wife is divorced, if thou dost not pay my debt this day;" the debtor says, "Yas" (instead of yes; *nayim* instead of *naam*), not intending an (affirmative) answer: but the creditor asks him to say "Yes" (or *naam*) and he says, "Yes," intending an answer (in the affirmative): the oath shall be obligatory; because when nothing lengthy intervened between the question and the answer, and the debtor did not adopt a new conversation, the whole of the conversation must be taken as one (connected expression).

1084. (1084.) A man says to another (in Persian), "Thy wife is divorced from thee with three divorces that thou hast not done this thing" (that is, "If thou hast done this thing"); the other man says, "With a thousand divorces;" this last expression shall be by way of an answer; so that if the man has not done the thing, the divorce shall not be caused.

1085. (1085.) A man is asked by another, "Hast thou a wife, except a divorced one;" he says "No:" his wife shall become divorced. But if he says "Yes," then his wife shall not be divorced; because in the

first case, the husband (in effect) says, "I have no wife, except a divorced wife;" and if he says so, his wife becomes divorced. But in the second case, he (in effect) says, "My wife is not divorced;" and if he says so, his wife shall not become divorced.

1986. (1086.) A man repeats the oath of another (which was to the effect) that, "If thou shalt enter the house, then my wife is divorced;" then when he arrives at the word "divorce," his own wife occurs to his mind: the learned lawyers have said that if the man, at the time of mentioning the word "divorce," intends to give up repeating the story and to begin the declaration of a divorce (as on his own behalf); and if his expression is such that a divorce could thereby be caused on his own wife (that is, if the circumstances are such that divorce could be caused on his wife, *e. g.*, his having an undivorced wife), the divorce shall be caused on his own wife; but if he does not intend to begin the declaration of a divorce (as on his own behalf), the divorce shall not be caused on his own wife, but (on the other hand) his expression shall be referred to what he was (reporting or) repeating. (See also paragraph 1432 *post*).

1987. (1087.) A man says to his wife, "Thou art divorced" and stops a while, and then says, "Thrice:" then if he stopped merely to take breath, his wife shall be divorced thrice; but if the stop was not for the purpose of taking breath, one divorce shall be caused; because stopping merely for the purpose of taking breath does not disjoin the sentences.

1988. (1088.) A man says to his wife, "Thou art divorced" and stops a while; he is then asked, "How many times," and he says, "Thrice:" Aboo Yusoof, on whom be peace, says, his wife shall be thrice divorced. The learned lawyers have said that it is possible that this view is specially that of Aboo Yusoof, on whom be peace (and not that of Aboo Huneefa), because according to him (Aboo Yusoof) if a man says to his wife, "Thou art divorced," and intends three divorces, his intention is correct (see Noor-ool Anwar, page 29, line 6, and page 151, line 3, from the bottom): and it is possible that this view might be that of Aboo Huneefa, on whom be peace (see paragraph 988), because, according to him, if a man divorces his wife, and then says, "I have rendered the divorce (triple or) three divorces," the divorce shall become three divorces.

1989. (1089.) A man says to his wife, "Thou art divorced once;" the woman says to him (in Persian), "One thousand," and he says

(in Persian), "A thousand," intending thereby the causing of divorce: the divorce shall be as he intended (that is, three divorces shall be caused).

1990. (1090.) A man says to his wife, "Thou art divorced, such as cannot be caused on thee," or "such as is not valid on thee:" she shall (still) be divorced once (the words used after the word "divorced" being considered surplusage).

So also if he says, "Thou art divorced thrice, such as cannot be caused on thee," or "such as are not valid on thee:" she shall be divorced thrice (the words used after the word "thrice," being considered surplusage).

1991. (1091.) A man says to his wife, "Thou art divorced at Mecca," whilst they are not in Mecca: the woman shall become instantly divorced. And so if he says, "Thou art divorced in such and such clothes," whilst she is in different clothes: the divorce shall be caused instantly.

[Note.—"Thou art divorced at Mecca" may mean, "As long as thou shalt remain in Mecca and not outside." So also "Thou art divorced in such and such clothes" may mean, "Thou shalt be divorced as long as thou shalt have those clothes on, and not be divorced when thou shalt not have those clothes on." This is the meaning of which those expressions are susceptible, but the principle which is here enunciated depends upon the following explanation:—See Rudd-ool Moohtar, Vol. II, page 721: if a man says "Thou art divorced at Mecca," or "In the house," or "In the shade," or "In the sun," or "In such and such clothes," this is *Tunjeez* or causing divorce instantaneously and not *Taleek* or causing divorce conditionally; because although those expressions really mean a conditional divorce, still the condition there is not valid. A condition to be good and valid must relate to a thing which is at present non-existent, but which is to come into existence afterwards, and such a thing consists of an act or time, as for instance, when a man says, "Thou art divorced on thy *entry* into Mecca," or "On thy *putting* on such and such clothes;" in which instances, the act is at present non-existent but is to come into existence hereafter; these instances mean "If thou shalt enter Mecca or put on such and such clothes, then thou art divorced:" and for instance when the man says, "Thou art divorced to-morrow," that means "When to-morrow comes, or if thou shalt live till to-morrow, thou art divorced." But places or clothes are already in existence, and, therefore, to make divorce conditional on such things is not valid

on account of the condition being bad; the condition is void, and, therefore, divorce takes place at once. Also in the case where the man having used the expression "Thou art divorced at Mecca," or "In such and such clothes," says, he meant, "on the entry into Mecca," or "on thy putting on such and such clothes," he shall not be confirmed by the Kazee, who will give no effect to this explanation, although as between the man and his God he might be right in his explanation. There is a rule in connection with conditions worth remembering and that is this, a condition dependent on a thing which is *kain* or already in existence is no condition at all; as for instance, where a man says, "If the heavens are above or if the sun has light, then thou art divorced:" here the divorce is caused at once].

And if he says, "Thou art divorced *in* the night and the day:" she shall be divorced once. And if he says, "Thou art divorced *in* the night and *in* the day," two divorces shall be caused.

[Note.—See Rudd-ool Moohtar, Vol. II, page 724. The expression "Thou art divorced *in* the night and the day," or "*In* the day and the night," means that the same divorce is to operate in the night and the day, because in these expressions the word "divorce," governs both "night" and "day;" but the expression, "Thou art divorced *in* the night and *in* the day," means "Thou art divorced in the day and thou art divorced in the night," and therefore here divorce is repeated: two divorces shall, therefore, be caused in the latter case and one divorce in the former case].

And if he says to his wife at night, "Thou art divorced in thy night and thy day:" she shall be divorced instantly. And if he says to his wife at night, "Thou art divorced in thy day and in thy night:" she shall be divorced on the morrow.

And if he says, "Thou art divorced to-morrow this day," she shall be divorced on the morrow, and the mention of "This day," shall be void. And if he says, "Thou art divorced this day, to-morrow," she shall be divorced instantly (and the use of the word "to-morrow," would go for nothing). And the principle in regard to this matter is that, if the husband mentions two portions of time so that there is no conjunction between the two, the divorce shall be caused in that portion of the time which is first mentioned, and the mention of the second portion of the time shall be void.

[Note.—See Rudd-ool Moohtar, Vol. II, page 724. When the husband refers the divorce to two portions of time, one of which is present

and the other is to come, and uses the conjunction "and," then, if he begins with the time which is present, only one divorce shall be caused, *e.g.*, if the man says, "Thou art divorced to-day *and* to-morrow," then only one divorce shall be caused; because "to-day" being mentioned first, the divorce takes effect immediately, and the same divorce continues "to-morrow" also. But if he begins with the future, and uses the present time afterwards, and couples both portions of the time with the conjunction "and," then two divorces shall take place, *e.g.*, "Thou art divorced to-morrow and to-day," this means, "When to-morrow shall arrive thou art divorced and thou art divorced to-day also." But if he says, "Thou art divorced to-day, and after to-morrow," then two divorces shall be caused; one divorce shall be caused "to-day," and the other divorce shall be caused "the day after to-morrow;" because when an interval of one day is allowed without a divorce, then the intention is that a second divorce shall be caused on the day after that interval. If the man says on the last day of the month, "Thou art divorced to-day and the beginning of the next month," then one divorce shall be caused; but if he expresses himself so, not on the last day of the month but before the last day, so as to allow an interval of time between "to-day," and the first day of the next month, then two divorces shall be caused. If he uses the expression without the conjunction "and," then the rule is set out in the text. See also paragraph, 1142 *post*].

1092. (1092.) And if he says, "Thou art divorced this day and when to-morrow comes," one divorce shall be caused instantly, and when the morrow comes and she is in her *Iddut* (which she would be in, if the husband has had intercourse with her), then another divorce shall be caused. (See also Rudd-ool Moohtar, Vol. II, page 725).

1093. (1093.) A man says in the month of Shaban, "Thou art" (that is, shalt become) divorced in the Ramzan (which follows Shaban): she shall become divorced as soon as the sun sinks on the last day of Shaban. But if he says, "Thou art divorced to-morrow," she shall become divorced as soon as the morning of the morrow arrives (because in common parlance, "to-morrow" means the day which is to arrive after the night; whereas month commences from the time the moon is visible).

And if he says, "Thou art divorced in the summer (*Syf*)," or "In the winter (*Shita*)," or "In the spring (*Rubee*)," or "In the autumn (*Khureef*)," the divorce shall not be caused unless in the time specified. And the learned lawyers have discussed how to distinguish these times:

some of them have said that summer (or *Syf*) is a season in which people are not under the necessity of using clothing with cotton padding and of warming themselves before the fire; and winter (or *Shita*) is the season in which people are under the necessity of using clothing with cotton padding and of warming themselves before the fire; and spring (*Rubee*) and autumn (*Khureef*) are seasons in which people are under the necessity of using clothing with cotton padding, but not of warming themselves before the fire; except that spring (*Rubee*) is at the end of winter and autumn (*Khureef*) is at the end of summer.

And others have said that summer or *Syf* is the season when foliage and fruit exist on trees; and spring (*Rubee*) is the time when there is foliage on the trees, but not fruit; and so is the autumn (*Khureef*).

1994. (1094.) A man purchases his wife: no divorce whether conditional or instantaneous shall be caused on her, until she remains the property of her husband (that is, if the man having married the slave girl of another, says to her for instance, "If I purchase thee, or if thou shouldst enter the house, thou art divorced," then if he purchases her, the effect of the purchase is to avoid the marriage, and the divorce, which assumes a valid marriage, will not take place, although at the time he had pronounced the conditional divorce, he was within his right in doing so; so, after the purchase, an instantaneous divorce, that is, one not dependent on any condition, would not take effect, because the marriage was put an end to by the purchase; so also if after purchase he gives her a conditional divorce, the divorce shall not be caused; because there must be ownership of marriage or *Milk-i-Nikah* in order to validate a *Taleek* or conditional divorce; but if he says, "If thou enter the house, then thou shalt be free," then emancipation shall be caused, because he has got ownership of person or *Milk-i-Rukba*). (See paragraph 1888).

So also if the husband (having married the slave girl of another) has made *Eela* with her (saying for instance, "I will not have intercourse with thee for four months, the effect of which is that after four months, one divorce is caused), and he then purchases her, and then the period of the *Eela* expires (that is, the four months as aforesaid expire after the purchase), divorce (which would have been otherwise caused by the expiry of four months) shall not be caused on her (by reason of the purchase because as soon as the husband purchases his wife, the relationship of husband and wife ceases; and therefore the effect of the *Eela* no longer subsists,

and there is consequently no divorce after the expiry of the four months) (See paragraph 1890).

And if a man, after having purchased his wife (such purchase having the effect of dissolving the marriage) emancipates her (before the time of the *Iddut* has expired, on account of the dissolution of the marriage), his divorce shall be operative on her whether the divorce be conditional or instantaneous (that is to say, a man marries the slave girl of another, and whilst she is in his marriage, he says to her, "If thou enter the house, thou art divorced;" then he purchases her after having intercourse with her: the purchase dissolves the marriage; but the woman shall be lawful to him by right of ownership; but he cannot give her in marriage to another man until the *Iddut* expires, because intercourse renders *Iddut* obligatory, although he himself can have sexual intercourse with her without waiting for the expiry of the *Iddut*: if he emancipates her before the expiry of the period which would have been her *Iddut*, if he had given her in marriage to somebody else, then he can divorce her treating her as being in her *Iddut*; so that if she enters the house, then the divorce conditionally pronounced on her whilst she was his wife would be caused; he can also give her an instantaneous divorce or a fresh conditional divorce. See Rudd-ool Moohtar, Vol. II, page 702, line 27, &c. The author of the Rudd-ool Moohtar after noticing diversity in views on this point, says that the Futwa is according to the rule which holds that the divorce by the husband shall not be caused, and he says this is the view taken by Kazee Khan. The passage of the Futawai Kazi Khan, here referred to by the Rudd-ool Moohtar is in paragraph 1888).

1995. (1095.) And if a slave makes the divorce of his free wife (with whom he has had intercourse) dependent on a condition, or if he says to her, "Thou art divorced according to the *Soonnut* (or tradition of the prophet)" and the wife then becomes the owner of her husband (the consequence of such ownership being that the marriage becomes dissolved; and also in the event of having had intercourse with her, she is obliged to observe the *Iddut*) and the husband then divorces her (within the period of the *Iddut*) or the condition of the conditional divorce comes to be realised (within the period of the *Iddut*) or the time of the tradition arrives (that is, the time of the divorce of the kind called traditionary or *Soonnee* divorce arrives, such time being the period of purity after the monthly course, because *Soonnee* divorce is one that takes place in a period of purity in which period there has been no sexual intercourse), the divorce shall

be caused on her as long as (*i.e.*, if or provided) she is in her *Iddut* (because it is after the conclusion of the *Iddut* that the relationship is completely cut off). (See paragraphs 1892, 1893 and 1894).

1996. (1096.) A man says to his wife, "I am divorced from thee" (instead of saying, "Thou art divorced from me," that is, he says the reverse of what is ordinarily said, the apparent meaning of the expression used by the husband being that the woman caused the divorce on the man), intending divorce thereby, the divorce shall not be caused.

But if he says, "I am separated (*Bain*) from thee," or "I am unlawful to thee," intending divorce thereby, divorce shall be caused (because when the wife gets divorced from the husband, the result is that the man gets separated from and becomes unlawful to the woman).

1997. (1097.) If a *Moortud* (or an apostate) enters the Dar-ool Hurub (or migrates there) and then divorces his wife (who is in the Dar-ool Islam), the divorce shall not be caused (because by becoming a *Moortud*, he forfeits his life and property, and the Kazee shall decree that he must be treated as dead, and a divorce by the dead is not effectual). But if he returns as a Moslem, whilst the woman is in her *Iddut* for him (that is the *Iddut* as of his death), then a divorce (which he might now give) shall be operative. (See Rudd-ool Moohtar, Vol. II, page 643, and Vol. III, page 465, Chapter on the Apostate or *Moortud*). (See paragraph 1898).

1998. (1098.) And when a female *Moortud* goes into the Dar-ool Hurub and her husband afterwards divorces her (from the Dar-ool Islam) and she then, before she gets her menses, returns to the Dar-ool Islam as a Moslem, then, according to Aboo Huneefa, on whom be peace, the divorce given by the husband shall not take effect; but according to his two disciples, the divorce shall take effect. (See Rudd-ool Moohtar, Vol. II, page 643). (See paragraph 1899). God knows best.

SECTION II.

ON DIVORCE BY INDIRECT EXPRESSIONS (OR KINAYAAT) AND IMPLICATIONS (OR MUDLOOLAT).

1999. (1099.) *Kinayaat* (or indirect expressions) are words which imply divorce without the divorce being expressly mentioned (or denoted by them), and they consist of three classes; and the state (or circumstances under which a man is impelled or has resort to indirect expressions in giving a divorce also) consists of three classes.

[NOTE.—See Rudd-ool Moohtar Vol. II, pages 761 to 765. Indirect expressions of divorce are such expressions as are not designed and meant for divorce, but divorce can be signified by them, and are such that they might mean divorce and might also mean something else. They are expressions which, if used in answer to a request for divorce, mean an affirmative answer, although at the same time they are capable of some other meaning. They are of three classes: The first class consists of expressions which might imply affirmance or *Ijabut* of divorce and might also mean *Rudd* or negativing of divorce. The second class consists of expressions which might imply affirmance or *Ijabut* of divorce and might also mean *Subb* or abuse. The third class consists of expressions which might imply affirmance or *Ijabut* of divorce, and do not imply *Rudd* or negativing of divorce, or *Subb* or abuse, but might also mean something different from divorce. The First Class consists of the following expressions:—*Ookhroojee, i.e.*, "Do thou get away from the house;" *Izhubee*, or "Do thou go away from this place;" *Koomee*, or "Do thou stand up;" *Tuqunnyee*, or "Do thou cover thy face with a veil;" *Tukhummury*, or "Do thou put on the hair band, or cover thy head;" *Istutiree*, or "Hide thyself;" or *Intiqilee*, or "Do thou transfer thyself from this house;" *Intuliqee*, or "Do thou walk out;" *Ooghroobee*, or "Be thou far from me;" *Aisubee*, or "Be thou away from me. These expressions might mean acceptance of the request of divorce and might also mean negativing it, *i.e.*, repudiating the request: *e.g.*, *Ookhroojee*, or "Do thou get away from this house" might mean "Very well, I divorce thee, get away from this house;" or it might mean "No, I will not divorce, get away from this house, from my presence, so that the quarrel might come to an end:" and so as regards the rest. The Second Class consists of the following expressions:—*Khuleeutoon*, or "Thou art unoccupied;" *Bureeutoon*, or "Thou art devoid;" *Huramoon*, or "Thou art unlawful;" *Bainoon*, or "Thou art separate;" and words which are of the same meaning are *Buttutoon*, or "Thou art cut off;" *Butlutoon* or "Cut off:" these expressions might mean acceptance of the request of divorce and might also mean abuse, *e.g.*, *Khuleeutoon* might mean "Thou art unoccupied with *nikah*" or might mean "Thou art unoccupied with goodness;" *Bureeutoon* might mean "Thou art devoid of *nikah*" or might mean, "Thou art devoid of goodness;" *Huramoon* might mean, "Thou art unlawful to me" or might mean, "Thou art an unlawful thing like the pig;" *Bainoon* might mean, "Thou art separate from me," or might mean, "Thou art separate

from goodness." The Third Class consists of the following expressions:—*Aituddee*, or "Observe thy *Iddut*," which means, "I have divorced you, now observe the *Iddut*;" another meaning of the expression is "Count the favors which I have shewn," and in this sense the expression has no connection with divorce. *Istubriyee Ruhumukai*, or "Purify thy womb;" it means, "I have divorced you, purify the womb by observing the *Iddut* to be enabled to marry somebody else;" another meaning of the expression is, "I will not divorce you; purify the womb and wait until you get the next menses, and after that I will divorce you." *Antai wahidutoon*, or, "Thou art one;" it means "Thou art divorced by one divorce;" it might also mean, "Thou art singular in goodness, or the best of thy kind." *Antai hoorrutoon* or "Thou art free;" it means "Thou art divorced, and therefore freed from the restraint of marriage;" it might also mean, "Thou art not the slave of anybody." *Ikhtaree*, or "Choose;" it means "I have given you option to divorce yourself, if you choose divorce yourself;" it might also mean, "Select some work." *Amrokai bu Yudaikai*, or "Thy power is in thy hands;" it means "I have vested thee with authority to divorce thyself;" it might also mean, "I have authorised thee to do some work." *Surruhtokai*, or "I have turned thee out;" it means, "I have divorced thee, and, therefore, turned thee out of the house;" it might also mean, "I have turned thee out of the house for some business." *Faruktokai*, or "I have separated thee;" it means, "I have divorced thee and separated thee;" it might also mean, "I have assigned to thee a separate room." The rules with reference to the use of these expressions are these: When the husband is in the state of what is called *Reza*, that is, a state when he wills divorce, not being in a state of anger, and there being no *Mazakura-i-Tulak*, or discussion or topic of divorce, then the use of all the three classes of expressions mentioned above, must, in order to cause divorce, be accompanied with intention to divorce, so that if the husband has formed an intention to cause divorce by those expressions, then divorce shall be caused, not otherwise; and the husband's word on his oath shall be accepted when he says, he had no intention to divorce. When the husband is in a state of anger and uses any of the expressions of the three classes mentioned above, then the rule is this:—that if the husband uses expressions of the first or the second class, *viz.*, expressions which admit of the alternative meaning of *Rudd* or negativing divorce, or of *Subb* or abuse, then it is necessary, in order that divorce might be

caused, that the husband should have the intention to cause divorce; so that divorce shall be caused if he has such an intention, and shall not be caused if he has no such intention: if he uses expressions of the third class, *viz.*, expressions which do not admit of *Rudd* or *Subb*, then it is not necessary that he should have an intention to divorce, and the use of those expressions shall cause divorce even if he has no intention to cause, or has intention not to cause divorce. When there is going on what is called a *Mazakura-i-Tulak*, or discussion or topic of divorce, then if the husband uses the first class of expressions, *viz.*, those which admit of *Rudd* or negativing of the divorce, then in order that divorce might be caused, it is necessary that he should have an intention to cause divorce; but if he uses expressions of the other two classes, then intention is not necessary, and divorce shall be caused without intention. As regards the expressions *Ikhtaree*, or "Choose," and *Amrokai bu Yudaikai*, or "Thy power is in thy hands," the effect of these is that when the husband uses these expressions divorce is not caused, but the wife becomes vested with authority to divorce herself, and divorce can only be caused when she, in consequence of such authority, divorces herself. Some of the authors have made a mistake in this matter when they have laid down that the use of those expressions of themselves causes divorce on the wife without an act on the part of the wife: the correct view is, that the wife gets the authority to divorce herself. and she does not become divorced until she exercises that authority and divorces herself].

2000. (1100.) One is a simple state and that is the state of the husband's will (or act of the mind to divorce, as contradistinguished from the circumstances of anger and dispute, &c., relating to the other two classes).

2001. (1101.) The other state is when the subject of divorce is going on, and this is when the woman asks for her divorce, or when somebody besides her asks for her divorce.

2002. (1102.) And the third state is a state of anger and quarrel.

2003. (1103.) In the state where the husband wills a divorce (that is, the first state) a divorce shall not be caused by any indirect expression unless he has an intention to cause divorce; and if the husband says, "I did not intend divorce by that (that is, by the indirect expression)" the word to be accepted shall be his word.

2004. (1104.) And in the second state, that is, when the subject of

divorce is being discussed, divorce shall be caused by eight expressions; and if the husband says, "I did not intend divorce (by using those indirect expressions)" he shall not be confirmed by the Kazee: these eight expressions are, (1) "Thou art unoccupied" (*Khuleeutoon*, that is to say, "Do as thou likest:" an animal is free when it is let loose to roam about at will); (2) "Thou art released (or devoid, *Bureeutoon*);" (3) "Thou art cut off" (*Butlutoon*); (4) Thou art separate" (*Bainnoon*); (5) Thou art unlawful" (*Huram*); (6) "Observe thy *Iddut* (*Aituddee*);" (7) "Thy power is in thy hands" (*Amrokai bu yudaikai*); (8) "Choose" (*Ikhtaree*).

[NOTE.—The first five expressions belong to the second class of the division given from the Rudd-ool Moohtar in the note to paragraph 1099, and the last three expressions belong to the third class. The last two expressions do not cause divorce, but vest the wife with authority to divorce herself as explained in that note. See also paragraphs 1638 and 1642 post].

2005. (1105.) And in a state of anger (on the part of the husband), divorce is caused by three out of these eight expresions (even without any express intention on his part), and if the husband says, "I did not intend divorce," he shall not be confirmed by the Kazee; and these three expressions are "Observe thy *Iddut*;" "Thy power is in thy hands;" "Choose (or do as it pleases thee)." And as regards the remaining five, according to Aboo Huneefa, on whom be peace, if the husband (after using them) says, "I did not intend divorce," then divorce shall not be caused and he shall be confirmed by the Kazee; because these (five) expressions, are capable of being used as terms of abuse, and shall, therefore, be referred to abuse, in a state of anger and quarrel. But Aboo Yusoof, on whom be peace, says (that the husband having, in a state of anger, used those five expressions), if he says, "I did not intend divorce," he shall not be confirmed by the Kazee (and express intention as regards these expressions when used in a state of anger is not necessary), in the same way as he is not confirmed when the matter of divorce is being discussed.

[NOTE.—As regards the expressions, "Thy power is in thy hands," or "Choose," the rule here laid down is subject to what has already been stated in the note to paragraphs 1099 and 1104, *viz.*, that they do not operate as divorce, but vest in the wife the authority to divorce herself].

2006. (1106.) And it is reported in the work called the Imla from

Aboo Yusoof, on whom be peace, that he has added four other expressions to these five expressions, and these four expressions are, (1) "I have no ownership (*Milk*) over thee;" (2) "I have no way (or power) over thee;" (3) I have set free (*Khullaito*) thy ways;" (4) "Mix with thy relations (see paragraph 1124 *post*)." If the husband uses these (four) expressions whilst a topic of divorce is going on, or in a state of anger, and says, "I did not intend divorce," he shall be confirmed by the Kazee, according to the view of Aboo Huneefa, on whom be peace; but Aboo Yusoof, on whom be peace, says, that he shall not be confirmed by the Kazee.

2007. (1107.) And besides these (twelve indirect expressions), in the case of other indirect expressions, such for instance as the expressions—(1) "Thy string is on thy neck (*Ghurib*, the pit at the Camel's back between the neck and the hunch);" (2) "(*Tuqunnyee* or) cover thy face with veil;" (3) "(*Tukhummuree* or) put on the hair band (that is cover thy head);" (4) (*Istubriyee* or) purify thy womb;" (5) "(*Koomee* or) stand up;" (6) "(*Ookhroojee* or) get away from the house;" (7) "(*Izhubee* or) go away from this place;" (8) "(*Intiqilee* or) transfer thyself from this house;" (9) "(*Intuliqee* or) walk out;" (10) "My marriage is not with thee;" (11) "I have made a gift of thee to thy relations, whether those relations accept or not,"—no divorce takes place, unless with intention; and when the husband says "I did not intend divorce," he shall be confirmed by the Kazee.

2008. (1108.) And it is reported from Aboo Huneefa, on whom be peace, that if the husband says, "I have made a gift of thee to thy father," or "to thy mother," or "for husbands," and intends divorce, divorce shall be caused; and that if he says, "I have made a gift of thee to thy maternal uncle," or "To thy brother," or "To thy sister," or "To so and so, a stranger," divorce shall not be caused even if the husband has an intention to divorce; and that similarly if he says "I have no necessity for thee" (no divorce shall be caused).

2009. (1109.) And it is reported from Mahomed, on whom be peace, that if the husband says to his wife, "Go away from this place" (or *Ifluhee*, which, according to the Arabic idiom, is used in the same sense as *Izhubee*, although it has another meaning, *viz.*, that of prosperity see Rudd-ool Moohtar, Vol. II., page 779) and has the intention to divorce, then this expression amounts to a divorce.

2010. (1110.) And if whilst the (*Mazakura* or) subject of divorce is going on, the husband says, "I have separated thee (or *Farukhtokai*)" or

"I have made thee separate (or *bain*)," or "I have parted thee (or *Abuntokai*)," or "I have separated myself from thee or *Abunto Minkai*)," or "There is no authority (or *sooltan*) for me over thee," or "I have abandoned thee (or *Surruhtokai* just as animals are left untethered to roam about)," or "I have made a gift of thee to thyself (or *Wuhubtokai*)," or "I have left (*turukto*) thy divorce (see paragraph 950)," or "I have opened the way of thy divorce (see paragraph 950)," or "I have opened thy way," or "Thou art set at liberty (*Saiaba*, a term applied to a she-camel when set at liberty after having been delivered of ten female colts, when all labor is dispensed with):" or "Thou art a free woman (or *Hoorra*)," or "Thou knowest thy state best," and (in which last case) the woman says, "I have withheld myself from thee:" (in all these cases) divorce is caused; and if the man says I did not intend divorce, he shall not be confirmed by the Kazee. (Compare paragraph 950 where in the case of two expressions which are repeated in paragraph 1110, *viz.*, *Turukto Tulakakai* and *Khullaito Subeela Tulakakai*, it is stated in paragraph 950 that intention is necessary, whereas the last words of paragraph 1110 point to a contrary inference; but from the Rudd-ool Moohtar, Vol. II, page 766, it appears that in the case of these two expressions intention to divorce is necessary and the authority given by the Rudd-ool Moohtar is the Khaneea).

2011. (1111.) And if the husband says to his wife, "There is no marriage between me and between thee," or says, "There does not remain marriage between me and between thee;" or says, "I have cancelled (*Fusukhto*) thy marriage," divorce shall be caused, if he has an intention.

2012. (1112.) And if the woman says to her husband, "Thou art not my husband" and the husband says, "Thou hast spoken the truth" (the husband) intending divorce thereby, divorce shall be caused according to the view of Aboo Huneefa, on whom he peace. (Compare paragraphs 969 and 1045.)

2013. (1113.) And if the husband says to his wife (in Persian), "Thou art nothing to me," repeating the same expression several times, this shall not amount to divorce.

So also if he says, "Thou art nobody to me" (there will be no divorce).

2014. (1114.) And if the husband says to his wife, "There does not remain between me and between thee any act," divorce shall be caused, if he has an intention.

So also if he says, "I am released from thy marriage," divorce shall be caused, if he has an intention.

[Compare paragraph 950, and see Rudd-ool Moohtar, Vol. II, page 766. The Arabic word for *release* is *Buree*, and as regards that word, the Rudd-ool Moohtar says, that if the husband says, "I am released or *ana bureeoon* from thy *marriage*," then in case the husband has an intention to divorce, divorce shall be caused; but if he says, "I am released from *thy divorce*," then even if the husband has intention to divorce, there is a diversity of opinion whether divorce shall be caused or not; and the more correct view is, that divorce shall not be caused; because the expression might mean, "I do not wish to divorce you," or in other words, "I release the divorce and do not wish to release the marriage:" but if the husband says, "I have released thee or *Buraito* from thy divorce," then there is a difference of opinion as to what is the correct view; the more correct view as to what is the correct view is, that, according to the Khaneea, divorce shall not be caused even if there is intention to divorce as set forth in paragraph 950; but the Futeh-ool Kúdeer says, that the more correct view is, that one *bain* or reversible divorce shall be caused; because the expression means, "I am unable to give you divorce," and this inability would only arise when a *bain* divorce has been given and the *Iddut* has expired, so that the husband is no longer in a position to give a further divorce. See also paragraph 1122].

2015. (1115.) And if the husband says to the wife, "I have no necessity for thee," intending divorce, divorce shall not be caused.

So also if he says (in Persian), "I have no use for thee:" so also if he says, "I do not desire thee" (no divorce shall be caused).

2016. (1116.) And if the husband says to his wife, "Do thou get at a distance from me," intending divorce thereby, divorce shall be caused.

2017. (1117). And if the husband says to his wife, "*Go thou* and sell thou this cloth," or "*Go thou* and cover thy face with veil (*Tuqunnyee*)," or "Stand up and eat," intending divorce by the expressions "*Go thou*" and "*Stand up*," divorce shall not be caused (because the subsequent words shew that these expressions, which admit of the meaning of divorce, and are also susceptible of other meanings are not used in the sense of divorce).

2018. (1118.) And if the husband says to his wife, "Four ways (*i.e.*, all four points of the compass) are open to thee," intending thereby divorce,

divorce shall not be caused, unless he says, "Four ways are open to thee, adopt whichever way please thee," in which case divorce shall be caused, if he has such an intention.

But if he says (in Persian), "Four ways for thee, *have I* opened," divorce shall not be caused, unless he intends divorce thereby.

2019. (1119). And if he says (in Persian), "Thou art three times just now," and says, "I did not intend divorce thereby," the word to be accepted shall be his.

2020. (1120). And if the woman says to her husband, "Divorce me," and the husband says, "I will not do (so)," and the woman then say, "If thou shalt not divorce me, I shall go away and marry," and the husband says (in Persian), "Thou art at liberty to take a husband or a lover (friend)," divorce shall not be caused, because this (last) expression of the husband shews that he does not care for her.

2021. (1121). A man is apprehensive that his marriage with his wife is invalid (*Fasid*) and he says, "I have abandoned this marriage which is between me and between my wife;" but it afterwards appears that their marriage is valid: his wife shall not be divorced (because he abandoned or cancelled what he considered to be an invalid marriage and the expression used did not amount to a divorce).

2022. (1122.) And if the husband says to his wife, "I am released (*Buree*) from thy divorce," this shall not amount to divorce.

But if he says, "I am released from thee, in consequence of thy divorce," divorce shall be caused, whether he intends divorce or not.

And if he says, "I am released from three thy divorces (that is, in consequence of having given thee three divorces)," some have said that divorce shall be caused, if he has an intention to divorce; whilst others have held that this shall not amount to divorce; and this is clear. (See paragraphs 1114 and 950).

2023. (1123.) A woman says to her husband (in Persian), "If thou hast not purchased that (that is, * * * * the sentence does not say), with defect (implying divorce by the use of the word defect) return it," and the husband says, "I have returned:" the learned lawyers have said that no divorce shall thereby be caused (because he did not say "I have returned *to thee*." See paragraph 942.)

2024. (1124.) And if the wife's father says to her husband, "If thou hast not purchased that (that is, my daughter) from me, return to me," and

the husband says, "I have returned (her) to thee," divorce shall be caused if he has an intention to divorce, the husband's expression being tantamount to saying (to his wife) "Mix with thy relations." (See paragraph 1106).

2025. (1125.) And if the husband says to his wife, "Thou art abandoned (*Surah* from *Tusreeh*)." then that is the same as if he says to her, "Thou art released (or unoccupied, *Khuleeatoon*. See paragraph 1104)."

2026. (1126.) A woman says to her husband, "Divorce me" and the husband says, "If thou desireth a thousand times:" no divorce shall be caused (because the expression might mean "Even if you desire a thousand times, I will not divorce you," and also because divorce is not mentioned by the husband; so his expression is ambiguous and the ambiguity is not cleared).

2027. (1127.) And if the husband says (in Persian), "I am disgusted with woman and with property;" then if he intends divorce thereby, this shall amount to divorce; otherwise not.

2028. (1128.) And the divorce, which is caused by the use of indirect expressions, is a complete (or *bain*) divorce according to us (that is, Aboo Huneefa, Yusoof and Mahomed) except such divorce as is caused by the use of (following) three expressions, *viz.*, (1) "Observe thy *Iddut*;" (2) "Purify thy womb;" (3) "Thou art (one or) single," (see paragraphs 1010, 1046, 1067), and the divorce which is caused by these expressions is one reversible (*Rujue*) divorce.

2029. (1129.) And if by the use of indirect expressions, the husband intends three divorces, such intention is good (or effectual), except in four cases, *viz.* where the expressions used by the husband are as follow:— (1) "Observe thy *Iddut*;" (2) "Purify thy womb;" (3) "Thou art single;" (4) "Choose thou (*Ikhtaree*)" and the woman (in the last case) must say, "I have chosen my person;" and in these four cases, the husband's intention to give three divorces is not valid.

[NOTE to 1128 and 1129, see Rudd-ool Moohtar, Vol. II, pages 763 764 and 766, "Thou art single or one" in the original Arabic is expressed by the words *Antai Wahidutan*, which also admits of being read as *Antai Wahidutan: Antai Wahidutan* means *Antai talikoon tulkatan Wahidatan*, or "Thou art divorced by divorce which is one divorce:" *Antai Wahidutoon* means *Antai tulkutoon Wahidutoon*, or "Thou art one divorce itself," as when

a just person is said to be justice itself: in both senses, in the expression "Thou art one," divorce is understood by implication or *Tukdeer*. So also in the expression *Aituddee*, or "Observe thy *Iddut*," divorce is understood by implication or *Tukdeer*; the sense of the expression being, "Observe thy *Iddut* because I have divorced thee," or "As I have divorced thee, observe thy *Iddut*." So also in the expression *Istubriyee Ruhumakai*, or "Purify thy womb," divorce is understood by implication. In the last two expressions, divorce is implied or *Mookuddur* by *Iktiza* or necessary implication; because unless divorce is implied, the expressions would have no meaning; in the first expression, the apparent meaning without any implication is clear by the grammatical construction, but the sense of divorce is shewn by the implication of divorce: in all the three expressions, however, divorce is *Mookuddur* or implied. There are, however, other indirect expressions in which divorce need not be implied, but, on the other hand, divorce is mentioned in express words: such expressions are "*Ana bureeoon min Tulakai kai*, or "I am released from thy divorce." *Buraito min Tulakai kai*, or "I am released from thy divorce." (See paragraph 950). *Khullaito subeela Tulakai kai*, or "I have opened the way of thy divorce." (See paragraph 950)." In expressions where divorce is *Mookuddur*, the divorce that is caused is *Rujue* or reversible divorce; and also where divorce is expressly mentioned, the divorce that takes place is *Rujue* or reversible divorce; in other words, when the result is that in expressions where divorce is expressly mentioned, the divorce that takes place is *Rujue* or reversible, then it must follow that where divorce is *Mookuddur* or implied, there also *Rujue* or reversible divorce should take place. In other indirect expressions, where divorce is neither expressly mentioned nor understood by implication or *Tukdeer*, there the divorce that takes place is *bain* or complete divorce; because, says the Rudd-ool Moohtar, Vol. II., page 767, these expressions denote complete separation and not temporary separation such as *buttutoon* and *butlutoon*, and *kuramoon*, and *bainoon* and other like expressions mentioned in the note to paragraph 1099. The matter of intention as regards the indirect expressions of divorce stands thus: the intention to cause three divorces in indirect expressions is effectual because three is a metaphorical unit or *Furd-i-Aitbaree*, as one is a real unit or *Furd-i-Hukeekee*; see notes to paragraphs 893 and 921; and intention to cause two divorces is not effectual, because the number two is neither a real nor a metaphorical unit, see Rudd-ool Moohtar, Vol. II, page 767: but in four expressions intention to cause

three divorces is not effectual; see Rudd-ool Moohtar, Vol. II, pages 763 and 766: in the expression, (1) "Thou art single or one," the intention to cause three divorces is not effectual, because although the infinitive or the *musdur*, that is, the word *Tulkutan*, which is understood after *Wahidutan*, admits of the number three or metaphorical unit, still the express mention of the word *Wahidutan* or one, prevents the metaphorical unit from being brought to bear on the expression: in the expressions (2) "Observe thy *Iddut*," and (3) "Purify thy womb," the *musdur* or infinitive, that is, the word divorce, which is implied in these expressions, is implied by *Iktiza*, or necessity for giving a meaning to the speech, and *Iktiza* or necessity does not, according to the rules of jurisprudence, admit of generalisation so as to admit of a metaphorical unit, because the real unit itself meets the necessity: the same reason holds good in the word (4) "*Ikhtaree*, or choose]."

2030. (1130.) And the intention to give two divorces is not valid, in indirect expressions. (See note to the preceding paragraph).

2031. (1131.) And if the husband causes divorce in Persian, saying "I have withheld my hand from thee" (see paragraphs 1069 and 1135) intending thereby divorce; then some of the learned lawyers have said that that is the explanation of (or equivalent to) the expression, "I have opened (*Khullaito*) thy ways," and no divorce shall be caused, unless he has intention to divorce; and that if he has such an intention, then one reversible (*Rujue*) divorce shall be caused; and others have said that the same is the explanation of (or equivalent to) "I have divorced thee," and divorce shall be caused without intention, and the divorce shall be reversible (*Rujue*); and the lawyers Aboo Leith and Sheikh Imam Aboo Baker Mohamed, son of Fuzul, on whom be peace, have said that, one complete (*bain*) divorce shall be caused, and that the husband shall not be confirmed when he says, "I did not intend divorce;" and the *Futwa* is given according to this (last) view.

2032. (1132.) And if the husband says to his wife (in Persian), "I have untied thy leg," one reversible divorce shall be caused according to them (Aboo Huneefa, Yusoof and Mahomed), and there is no necessity of an intention, because the same is an explanation of (or is equivalent to) the expression, "I have divorced thee."

2033. (1133.) And if the husband says (in Persian), "With one divorce, I have withheld my hand from thee," this shall amount to a rever-

sible (*Rujue*) divorce, and he shall not be confirmed when he says he did not intend divorce thereby.

2034. (1134.) And if the husband says (in Persian), "I have withheld my claws from thee," intending divorce thereby, then the lawyer Aboo Jaffer, on whom be peace, says, that one complete (*bain*) divorce shall be caused thereby; whilst others have said that one reversible (or *Rujue*) divorce shall be caused: but the first view is the more correct of the two.

2035. (1135.) And it is laid down in the Fatawai Nusufee that if the husband says to his wife (in Persian), "Thee have I abandoned," or "Thee have I released," or "From thee have I withheld my hand," or if he says, "Thee have I left:" no divorce shall be caused unless he has an intention.

So also if he says (in Persian), "I have withheld my hand from thee," or "Released thee." (See also paragraphs 1069 and 1131).

And if he intends divorce by the use of his expressions, "I have released thee," or "Abandoned thee," one complete (*bain*) divorce shall be caused: and by his expression, "I have withheld my hand from thee," one reversible (*Rujue*) divorce shall be caused (because the last expression is not so strong as regards separation as the first two expressions).

2036. (1136.) And if the word "divorce" is added to these expressions, as for instance, if he says (in Persian), "I have withheld my hand from thee by one divorce," then one reversible (*Rujue*) divorce shall be caused, and effect shall be given to the word "Divorce," just as if he says (in Persian), "Thy authority is in thy hands in the matter of divorce," or "Choose thy person by (or as regards) one divorce," and the woman accepts the authority to divorce herself (and does divorce herself) one reversible (*Rujue*) divorce shall be caused. (See paragraphs 1128 and 1129).

2037. (1137.) And if the husband says (in Persian), "I have abandoned (*Hishtum*)," or "I have abandoned as wife:" divorce shall not be caused (if there is no intention) according to the view of Aboo Huneefa, on whom be peace, although this might whilst a topic of divorce was going on, or whilst there was a quarrel: but if he intends divorce thereby, then one reversible divorce shall be caused. And it is reported from Aboo Yusoof, on whom be peace, that when he mixed with the people of *Ajum*, (*i.e.*, country outside Arabia), he found this expression a direct (or *Sureeh*) expression for divorce in *Ajum* countries (*i.e.*, of the

same force as "Divorce"), and he (Aboo Yusoof) said, that divorce shall be caused, although the husband might have no intention, in whatever state he might be (whether discussing a topic of divorce or in a state of anger or in a state of *Reza*, *i.e.*, in a state different from that of anger and different from a state discussing a topic of divorce), and that the husband shall not be confirmed by the Kazee that by using the expression (*Hishtum*) he intended the abandonment of (his right to prevent her) going out (that is, that he meant, "I have abandoned my right of prevention, that is, I have permitted her to go out);" and that if he intended a complete (or *bain*) divorce, or intended three divorces, then (the character of) the divorce shall be as he had intended; because the expression (*Hishtum*) admits of a complete divorce or of three divorces being given thereby, according to the *idiom* of the *Ajumees*.

2038. (1138.) A man says to his wife, who is a slave girl (of another who had given her in marriage to him), "Thou art separated (*bain*)," and intends two divorces thereby, his intention is correct (because *bain* either denotes a real unit or *furd*, which is one,—and in this sense it is operative as such without any intention—or it denotes what is called a metaphorical unit or *Furd-i-Hookmee*, that is, a unit so considered by all the parts being taken together to form a unit. *Bain*, in the first sense, would denote one divorce, and in the second or collective sense, would denote the number of divorces which the case is capable of, and this number is three in the case of a free woman and two in the case of a slave girl).

But if he says so to a free woman, whom the husband had already divorced once (so that he has now only the power to give two divorces) and intends two divorces by the expression, then (only) one divorce shall be caused (because two divorces, in the case of a free woman, do not constitute either a real or a metaphorical unit).

2039. (1139.) A man says to his wife, "Observe thy *Iddut*," "Observe thy *Iddut*," "Observe thy *Iddut*;" and says that I intended from all the (three) expressions only one divorce: he shall be confirmed as between him and his God (because,—see Rudd-ool Moohtar, Vol. II, page 769,—when the intention is to cause one divorce, although the expression has been used thrice, then the expression by which divorce is caused is the first expression, and the second and third expressions are used for the purpose of repetition of the first expression with the object of giving force or *Takeed* to the first expression); but so far as the Kazee is

concerned she shall be divorced thrice (because when the intention is to cause only one divorce although three expressions are used, then each expression operates to cause one-third of a divorce; and inasmuch as there could be no fraction of a divorce, the result is that each expression is effective to cause one divorce). And if he says, I meant divorce by the first expression, and I did not mean anything by the rest, the woman shall be divorced thrice (because,—see Rudd-ool Moohtar, Vol. II, pages 767 and 768,—when by the first expression the intention is to cause divorce, then the use of the expression, "Observe thy *Iddut*," in the sense of causing divorce, shews, by Dulalut-i-Hal, that is, by implication, that the sense and meaning of the expression "Observe thy *Iddut*," is to cause divorce, and, therefore, although there is no intention in the second and third expressions, still those expressions shall be taken to mean divorce, and, therefore, the result will be three divorces): and if he says, "I did not intend anything by the first expression, and I intended divorce by the second and third expressions, then this will amount to two reversible (*Rujue*) divorces, (because, by the use of indirect expressions, divorce is caused only when there is intention to divorce - and there being no intention to cause divorce by the first expression, no divorce shall be caused by that expression; but there being intention to cause divorce by the second expression and also by the third expression, two divorces shall be caused: so also if there is no intention to cause divorce by the first and second expressions, but there is intention to cause divorce by the third expression, then only one divorce shall be caused: so also if he has no intention to cause divorce by the use of any of the three expressions, then no divorce shall be caused—see Rudd-ool Moohtar, Vol. II, page 768: and the two divorces or one divorce, that shall be caused shall be *Rujue* or reversible, for reasons stated in the notes to paragraphs 1128 and 1129).

And if he says, I did not intend anything by the first and second, but I intended divorce by the third, then this amounts to one reversible (*Rujue*) divorce. And if he says, "I did not intend anything by the first and third expressions, but I intended divorce by the second expression, the woman shall be divorced twice (for the same reason as when he intends divorce by the first expression and has no intention by the second and third expressions).

And if he says, I intended divorce by the first expression and *Iddut* by the rest (that is, if he says, "I intended to mean by the second and

third expressions that the woman should observe her *Iddut*"), then his intention shall be correct (and given effect to, and one reversible divorce shall be caused, because he intends that which is the natural and real meaning of the expression, "Observe thy *Iddut*,". See Rudd-ool Moohtar, Vol. II, page 768). And if he says, "I intended divorce by the first and second and *Iddut* by the third:" his intention shall be correct (and shall be given effect to and two reversible divorces shall be caused).

2040. (1140.) And if the husband says to his wife, "Observe thy *Iddut*," and repeats the same several (*i. e.*, three) times, and says, "I meant menses (which is in effect *Iddut*) by the expression:" he shall be confirmed by the Kazee.

[NOTE—See Rudd-ool Moohtar, Vol. II, page 768. If a man says three times, "Observe thy *Iddut*," then this case admits of twenty-four forms. I.—If he intends one divorce by each of the three expressions, then three divorces shall be caused; because in that case he intends one-third of one divorce by each expression, and a fraction of a divorce amounts to a full divorce. II.—If he intends divorce by the first expression and does not intend anything by the second and third expressions, then also three divorces shall be caused. III.—If he intends menses by the first expression, and intends nothing by the second and third expressions, then three divorces shall be caused; because when he intends menses by the first expression, then the intention of menses means "Observe thy *Iddut* according to menses,"—and a woman is not required to observe *Iddut* unless she has been divorced,—and, therefore, the intention of menses in the first expression involves divorce; and inasmuch as the first expression in this way intends divorce, the second and third expressions, in which there is no intention, would also amount to two divorces. IV.—If he intends divorce by the first two expressions, and intends nothing by the third expression, then also three divorces shall be caused. V.—If he intends divorce by the first and third expressions and intends nothing by the second expression, then also three divorces shall be caused. VI.—If he intends menses by the first expression and intends divorce by the second and third expressions, then also three divorces shall be caused. In all these six cases, three divorces shall be caused. VII.—If he intends nothing by the first and third expressions and intends divorce by the second expression, then two divorces shall be caused. VIII.—If he intends divorce by the first expression, and intends menses by the second expression, and intends nothing by the third expression, then

also two divorces shall be caused, *viz.*, one divorce by the first expression, and the second expression being used after the first expression has denoted divorce, it is not necessary to imply a divorce by the second expression which has been used in the sense of menses, that sense being capable of effect being given to it as regards the divorce intended by the first expression; and the third expression, in which there is no express intention comes to be used after the subject of divorce is mentioned by the use of the first and second expressions, will also establish one divorce. IX.—If he intends divorce by the first expression and nothing by the second expression, and intends menses by the third expression, then also two divorces shall be caused; because the second expression is used after the *Mazakara* or topic of divorce, and therefore one divorce shall be caused by that expression although there is an absence of intention. X.—If he intends nothing by the first expression and intends divorce by the second and third expressions, then also two divorces shall be caused. XI.—If he intends menses by the first and second expression and intends nothing by the third expression, then also two divorces shall be caused. XII.—If he intends menses by the first and third expressions and intends nothing by the second expression, then also two divorces shall be caused, *viz.*, one divorce by the implication involved in the first expression; and no divorce shall be caused by the second expression, which has not been used after a *Māzakara* or topic of divorce, and one divorce be caused by the implication involved in the third expression. XIII.—If he intends divorce by the first and second expressions and intends menses by the third expression, then also two divorces shall be caused, the intention of denoting menses in the third expression not requiring a divorce and such intention being capable of having effect given to it in consequence of the divorce caused by the second expression. XIV.—If he intends divorce by the first and third expressions, and intends menses by the second expression, then two divorces shall be caused. XV.—If he intends menses by the first expression and by the second expression, and intends divorce by the third expression, then two divorces shall be caused. XVI.—If he intends menses by the first and third expressions, and intends divorce by the second expression, then two divorces shall be caused. XVII.—If he intends nothing by the first and third expressions, and intends divorce by the second expression, then two divorces shall be caused; that is to say, no divorce shall be caused by the first expression, because there is an absence

of intention, and one divorce shall be caused by the second expression by implication, and the third expression, although used without any intention, shall cause one divorce; because the expression has been used after the *Muzakura* or topic of divorce. In all these eleven cases, two divorces shall be caused. XVIII.—If he intends menses by all the three expressions, then one divorce shall be caused. XIX.—If he intends nothing by the first and second expressions and intends divorce by the third expression, then one divorce shall be caused. XX.—If he intends nothing by the first and second expressions, and intends menses by the third expression, then also one divorce shall be caused. XXI.—If he intends nothing by the first expression and intends divorce by the second expression, and intends menses by the third expression, then also one divorce shall be caused. XXII.—If he intends nothing by the first expression, and intends menses by the second and third expressions, then also one divorce shall be caused; because the second expression implies divorce, and the third expression is capable of effect being given to it with its natural or real intention. XXIII.—If he intends divorce by the first expression, and intends menses by the second and third expressions, then also one divorce shall be caused. In all these six cases one divorce shall be caused. XXIV.—If he intends nothing by any of the three expressions, then no divorce shall be caused. Put in a tabular form, the twenty-four cases are these:—

I	1st Divorce,	2nd Divorce,	3rd Divorce,	3 Divorces.
II	1st divorce,	2nd nothing,	3rd nothing,	,,
III	1st menses,	2nd ,,	3rd nothing,	,,
IV	1st divorce,	2nd divorce,	3rd nothing,	,,
V	1st ,,	2nd nothing,	3rd divorce,	,,
VI	1st menses,	2nd divorce,	3rd divorce,	,,
VII	1st nothing,	2nd divorce,	3rd nothing,	two
VIII	1st divorce,	2nd menses,	3rd ,,	,,
IX	1st ,,	2nd nothing,	3rd menses,	,,
X	1st nothing,	2nd divorce,	3rd divorce,	,,
XI	1st menses,	2nd menses,	3rd nothing,	,,
XII	1st ,,	2nd nothing,	3rd menses,	,,
XIII	1st divorce,	2nd divorce,	3rd ,,	,,
XIV	1st ,,	2nd menses,	3rd divorce,	,,
XV	1st menses,	2nd menses,	3rd divorce,	,,
XVI	1st menses,	2nd divorce,	3rd menses,	,,
XVII	1st nothing,	2nd menses,	3rd nothing,	,,

XVIII	1st menses,	2nd menses,	3rd menses,	one
XIX	1st nothing,	2nd nothing,	3rd divorce,	„
XX	1st „	2nd „	3rd menses,	„
XXI	1st „	2nd divorce,	3rd „	„
XXII	1st „	2nd menses,	3rd „	„
XXIII	1st divorce,	2nd „	3rd „	„
XXIV	1st nothing,	2nd nothing,	3rd nothing,	No Divorce

The principle is, that when the expression *Aituddee* or "Observe thy *Iddut*" is used with the intention of divorce, then the *Muzakura* or topic of divorce is established; then, if the same expression is subsequently used with the intention that it should mean menses, that intention must be affirmed; because after divorce the woman must observe the *Iddut*; and if in the subsequent expression there is no intention, then the absence of intention shall go for nothing; on the other hand, this subsequent expression shall be construed in the sense of divorce, because the expression comes to be used after the *Muzakura* or topic of divorce. If there is no intention at all by the use of any of the three expressions, then the absence of intention will have effect and no divorce shall be caused. If there is no intention in the expression used before an expression used with intention, then the absence of intention in the first mentioned expression shall have effect. If, by the use of any one expression, the intention is in regard to menses, and there is no intention in the expression previously used, then by the use of the first mentioned expression, that is, the expression used with the intention of menses, divorce shall be caused. And by the use of the expression with the intention to mean menses, the *Muzakura* or topic of divorce is established].

2041. (1141.) And if the husband says, "Thou art divorced, therefore observe thy *Iddut*" and says, "I intended *Iddut* by this expression ('Observe thy *Iddut*:') " his intention shall be valid, (and only one divorce resulting from the expression "Thou art divorced," shall be caused, and the intention of *Iddut* in the use of the word "*Aituddee*" or "Observe thy *Iddut*" shall be given effect to; because that expression has been used after express words of divorce); but if he intends another divorce by the expression ('Observe thy *Iddut*'), or if he does not intend anything, then this (that is, the expression 'Observe thy *Iddut*') shall amount to another divorce (and the divorce that shall be caused by the expression "Observe thy *Iddut*" shall be a *Rujue* or reversible divorce, as laid down in paragraphs 1128 and 1129. There being *Muzakura* or topic of divorce contained in the

expression "Thou art divorced," if the expression "Observe thy *Iddut*," is used even without any intention, a divorce shall be caused for reasons stated in the notes to the preceding paragraph).

So also if he says, "*And* observe thy *Iddut*, (that is, if he says, "Thou art divorced *and* observe thy *Iddut*"), or says, "Observe thy *Iddut*," (that is, if he says, "Thou art divorced, observe thy *Iddut*") without the conjunction.

But it is reported from Aboo Yusoof that if the husband says, "Thou art divorced, therefore observe thy *Iddut*," and does not intend anything (by the expression "Observe thy *Iddut*,") then this amounts to one divorce (*viz.*, that caused by the expression "Thou art divorced," and the expression, "Therefore observe thy *Iddut*," used without any intention, shall establish only *Iddut*, and not divorce; because Aboo Yusoof says, that the word *fai* or "therefore" is used to conjoin one expression with another without involving the idea of space of time intervening, or, in other words, it is used for *Takeeb bila Tarakhee*, that is, sequence without intervention, and if so the imperative "Observe thy *Iddut*," amounts to a command to commence the *Iddut*, and therefore the expression "Observe thy *Iddut*," must be taken to mean menses: whereas, according to Aboo Huneefa, the expression "Therefore observe thy *Iddut*," having been used after the *Muzakura* or topic of divorce, one divorce shall be caused, and the imperative form shall be taken to mean divorce: but the Rudd-ool Moohtar gives preference to the view of Aboo Yusoof): and that if he says "*And* observe thy *Iddut*," (that is, if he says, "Thou art divorced and observe thy *Iddut*,") or expresses himself without a conjunction (saying "Thou art divorced, observe thy *Iddut*,") another divorce shall be caused (by the expression "Observe thy *Iddut*," which he uses without any intention; and there is no difference in this view; because the expression "And observe thy *Iddut*," or "Observe thy *Iddut*," is a new sentence or *Kulam-i-Moostanif*, which is used after the *Muzakura* or topic of divorce, and therefore the expression must mean divorce. See Rudd-ool Moohtar, Vol. II, page 769).

2042. (1142.) A man says to his wife in the middle of the day, "Thou art divorced in the first part of this day and at the end of it:" this shall amount to one divorce. But if he says, "The end of this day and the first part of it," she shall be divorced twice; because the divorce, which is caused in the first part of the day, remains effectual (that is, continues to subsist) to the end of the day, and therefore only one divorce shall be caused (in the first case mentioned above). But when the hus-

band commences with the end of the day, then the divorce given at the end of the day, not being capable of being caused in the first part of the day, there shall be two divorces (in the second case mentioned above. On this subject, see paragraphs 1091 and 1093).

So also if he says, "Thou art divorced to-morrow and to-day:" two divorces shall be caused; but if he says, "To-day and to-morrow," no divorce except one shall be caused. (See also paragraph 1091).

And if he says, "Thou art divorced to-day and yesterday:" two divorces shall be caused; but if he says, "Yesterday and to-day," one divorce shall be caused.

And if he says, "Thou art divorced to-day and after to-morrow," she shall be divorced twice according to Aboo Huneefa and Aboo Yusoof, on whom be peace.

2043. (1143.) A man says to his wife, "Thou art divorced, like a thousand:" then if he intends three divorces, three divorces shall be caused; but if he does not intend anything, then this shall amount to one complete (*bain*) divorce according to the second view of Aboo Huneefa and Aboo Yusoof, on whom be peace; but Mahomed, on whom be peace, says, that the same shall amount to three divorces so far as the Kazee is concerned (that is, under the law. See also paragraphs 1057 and 1058).

2044. (1144.) And if he says, "Thou art divorced once, like a thousand," intending three divorces or not intending (anything), then this shall amount to one complete (*bain*) divorce according to their view, (that is, the view of Aboo Huneefa and his two disciples).

And if he says, "Thou art divorced, like the numbers in a thousand," or "Like the numbers in three:" then this shall amount to three divorces so far as the Kazee is concerned.

And if he says, "Thou art divorced like three," this amounts to three divorces. (See also paragraphs 1057 and 1058).

And if he says, "Thou art divorced until three are completed:" this amounts to three divorces; (because it means that the divorce shall continue to be caused until there are three divorces); if he says, "Until I complete for thee three," or "Until I cause on thee three," then this amounts to one divorce (because it means, "Thou art divorced once until I cause three divorces, and when I shall cause three divorces, then thou shalt be thrice divorced").

2045. (1145.) And if he says, "Thou art divorced the dimensions of which fill the whole of the house," and does not intend anything, then this shall amount to one complete (*bain*) divorce: (the divorce is complete or irreversible because the quality having been super-added, the divorce must be stronger than an ordinary or reversible divorce. See paragraphs 933 and 1059).

2046. (1146.) And if he says, "Thou art divorced like the mountain," or "Like the grain of mustard:" then this shall amount to one complete (or *bain*) divorce according to Aboo Huneefa, on whom be peace (see paragraph 1059); but according to Aboo Yusoof, on whom be peace, this shall amount to one reversible (*Rujue*) divorce. And if he says, "Like the greatness of the mountain," or "Similar to the greatness of the mountain," or likens the divorce to a small or great thing, then this shall be one complete (*bain*) divorce; but if he intends three divorces, then the same shall amount to three divorces.

2047. (1147.) And if he says, "Thou art divorced thus," and points out (that is, shews) one finger, then the same shall amount to one divorce; and if he points out (or shews) two fingers, then the same shall amount to two divorces; and if he points (or shews) three fingers, then the same shall amount to three divorces. And in this matter regard is had to the fingers, which are separated (or shewn separately so as to be counted), and not to those which are closed (and which might be counted as one); and if he says, "I intended the palm of the hand (that is, if he says, "although I pointed out one, or two or three fingers, but I meant the palm of the hand, so as to cause only one divorce") or the closed fingers (that is, if he says, "I did not mean the open fingers which were actually shewn, but I meant all the fingers as if they had been closed, so as to cause one divorce") then he shall not be confirmed by the Kazee. (See Rudd-ool Moohtar, Vol. II, pages 735 and 736).

2048. (1148.) And if he says, "Thou art divorced like this," and points three fingers, and intends three divorces, then three divorces shall be caused; but if he intends one divorce, then (only) one divorce shall be caused (and that divorce shall be *bain* or complete and irreversible; because the three fingers to which he points out shew the strength of the divorce and not the triple character of the same: in paragraph 1147 the husband says, "Thou art divorced thus," and points three fingers and in the present case, he says, "Thou art divorced *like* this").

SECTION III.

ON THE DIVORCE OF THOSE WHO HAVE NO UNDERSTANDING.

2049. (1149.) Divorce given by one under compulsion is effectual according to us (that is, Aboo Huneefa and his two disciples, on whom be peace), but Shaffei, on whom be peace, differs from this view. So also (is effectual) the divorce given by those who are intoxicated by means of *Khumur* (or wine made of the juice of grape) or *Nubeez* (a kind of beer) And Kurky and Tuhawee say—and what they say is one of the two views of Shaffei, on whom be peace,—that divorce given by those who are intoxicated is not effectual.

2050. (1150.) And if a man has been compelled to partake of *Khumur* (or wine), or if he takes wine under necessity, and he becomes intoxicated, and divorces his wife (under such intoxication), then the learned lawyers have differed in this matter: and the correct view is this, that in the same way as the man is not liable to punishment, so shall the divorce given by him not be effectual, and his dealings (or *Tusurroof*) shall be without effect.

2051. (1151.) And it is reported from Mahomed, on whom be peace, that if a man drinks of *Nubeez* (or beer), and the same does not agree with him, and the fumes thereof ascend and give him a headache, and his understanding is lost on account of the headache and not on account of his drinking, and he divorces his wife (under such circumstances), the divorce shall not be caused.

But if his understanding is lost on account of his drinking (the *Nubeez* or) the wine, or if he is struck on the head, so that his understanding is lost, and he then divorces his wife, the divorce (so given by him) shall not be caused.

2052. (1152.) And if a man drinks of wines made of grain (such as rice or wheat or barley, &c.), or fruit or honey, then if he divorces his wife or emancipates his slave, the learned lawyers have differed in the matter. The lawyer Aboo Jaffer, on whom be peace, says that the correct view is, that in the same way as he is not liable to punishment so shall his dealings (or *Tusurroof*) be devoid of effect.

2053. (1153.) And the divorce given by a player (or *Layib, i.e.*, one who acts out of sport), or a jester (*Hazil*) is effective.

2054. (1154.) And as regards one whose understanding is lost in consequence of (taking) hemp (*Banj*) or the milk of the ass, the divorce or emancipation given by him shall not be effectual.

Section IV.

ON DIVORCE BY WRITING.

2055. (1155.) Writing is of two kinds,—customary (*Mursoom*) and non-customary (Ghyr-Mursoom). And by customary writing, I mean writing which is addressed and directed to somebody, such as writing addressed to a person who is absent (or away from the writer): and non-customary writing is writing which is not addressed and directed (to any person).

2056. (1156.) Writing which is non-customary is of two kinds; manifest (*Moostubeen*) and not manifest. Manifest writing is writing written on paper (*Saheefa*) or wall or on the ground, in such a way that it is possible to understand (*i.e.*, make out) the writing and read the same: and writing not manifest is what is written in the air or upon water or upon something, so that it is not possible to understand or read the same.

2057. (1157.) In (non-customary) writing which is not manifest, divorce shall not be caused, although the husband might have an intention. But if the writing is manifest, although it might be non-customary (as when a man writes on a piece of paper, "My wife is divorced," and does not address the writing), the divorce shall be caused if there is an intention, not otherwise. But if the writing is customary (that is, if it is addressed to somebody) then the divorce shall be caused whether he intends it or not (because the writing being customary, that is, addressed to some person, it must be taken that the writer makes use of the words and pronounces them to some person in reference to his wife).

2058. (1158.) Then in the case of a customary writing, if the husband writes an absolute divorce (that is, without the qualification that the wife is to be divorced on her receiving the writing) in this way, that is, he writes, "After this (that is, after what has preceded), thou art divorced," then as soon as he writes this (that is, the words "Thou art divorced"), the divorce is caused (even without the wife receiving the writing), and the wife is bound to observe the *Iddut* from the time of the writing; but if he renders the divorce conditional (or dependent) on the wife receiving the writing, in this way, that is, the husband writes,

"When thou receivest this writing of mine, then thou art divorced;" then in this case, if she does not receive the writing, the divorce shall not be caused; but if the husband writes to his wife, "When thou receivest this writing of mine then thou art divorced," and he then writes other necessary matters, and the woman receives the writing, whether she reads it or not, the divorce shall be caused.

2059. (1159.) And if it occurs to him after what he has written (in regard to other matters, which are located in the writing in the manner shewn in the above paragraph, that is, the clause relating to other matters being after the clause relating to divorce) to strike out from the writing what he has written regarding other matters, and he does so, leaving intact the words, "When thou receivest this writing of mine then thou art divorced" (and also leaving intact the superscription and address, *et cetera*) and she receives the writing, the divorce shall be caused (and the writing does not cease to be a writing because something at the end of it has been struck out—the term "writing" being applicable to the principal matter, which ordinarily finds a place at the beginning, according to the rule laid down in paragraph 1161 *post*); because the man's expression, "This writing of mine," points to what has been written before divorce (is mentioned), and when such a writing (that is writing which contains the mention of divorce before something else is written, although what follows might be struck out) is received by her, then the divorce shall be caused.

But if (in the same kind of writing as regards the location of the subjects contained in the writing) it occurs to him after what he has written (regarding the divorce and other matters), to strike out "When thou receivest this writing of mine then thou art divorced," and he strikes them out, and leaves intact what he has written regarding the other matters, and the woman receives this writing, the divorce shall not be caused; because the condition for the divorce taking place is that the woman should receive what was written before the word "this" (in the sentence, "When thou receivest *this* my writing"), and when he has struck out that (*i.e.*, the words "When thou receivest this my writing"), then she has not received that with which the divorce is connected (that is, she has received no writing at all, because "writing" means the principal subject, and such subject is written at the beginning. See paragraph 1161 *post*). This is the rule when other matters are written after the (clause regarding) divorce.

[NOTE.—A divorce written is similar to a divorce pronounced: if the husband writes something which may be correctly called *a writing*, and then writes the following words—"When thou receivest this writing thou are divorced"—the effect of this is the same as if the husband had uttered those words; and if he utters those words, then a valid condition is created and on the condition being realized the effect is sure to follow; that is to say, if he utters the words "When thou receivest this writing of mine then thou art divorced," then on the wife receiving that writing she must become divorced. And writing being tantamount to articulating or uttering the words, if the husband in his "writing" writes, "When thou receivest this writing of mine then thou art divorced," and afterwards strikes out the words "When thou receivest this writing of mine then thou art divorced," even then the divorce shall be caused if the wife receives the writing; and in such a case divorce can only be avoided if what is termed 'the writing' is not received by the wife. There are two ways by which the writing may be said not to have been received by the wife; first, if the paper on which the "writing" is written, is not at all received by the wife; or second if the paper is received by her, but it contains nothing which can be called "this writing."]

2060. (1160.) But if the husband writes the other matters first (and therefore those other matters constitute what is called "the writing"), and after that, writes, "When thou receivest this my writing, then thou art divorced," and he afterwards strikes out the other matters (the effect of which is that there is no "writing"), leaving the words "When thou receivest this my writing, then thou art divorced," and she receives the same (that is, the paper in which the writing is so mutilated or struck out), the divorce shall not be caused; because the condition for the operation of the divorce in this case (that is, in the case where the other matters, which are struck out, are stated in the first part of the letter), is the receiving by the woman of what has been written regarding the other matters (which constitute the "writing"), anterior to the writer's words "When thou receivest this writing of mine, thou art divorced," and she never received this (that is, the "writing" which is the statement of the other matters written before the words of divorce).

And if (in the same kind of writing where the divorce clause comes subsequently), he strikes out the expression "When thou receivest this my writing (then thou art divorced)," and leaves what is written before it (*i.e.*,

the statement regarding other matters), and this (paper so written and struck out) reaches her, the divorce shall be caused (because the "writing" technically so termed reaches her although he pens through the concluding clause, the "writing" being the principal matter, and the principal matter being written first; therefore it cannot be said that in this case she has not received the "writing:" the wife having received the "writing" she becomes divorced, because the writing is of the constomary kind, and in such writing the divorce clause as originally written must be taken as if the husband had pronounced the words "When thou receivest this my writing thou art divorced:" and after divorce has once been made dependent on a condition, it is beyond the power of the husband to negative the operation of the divorce on the condition being realised, unless he puts an end to the relationship of husband and wife by three immediate divorces. His striking out the divorce clause from the writing cannot have greater effect than in the case where having verbally made the divorce dependent on a condition, he were to say, "I nullify the operation of the divorce," and this he is unable to do).

2061. (1161.) The result is, that what is written before the words "This writing of mine" is the principal thing, and what follows is secondary, and regard is to be had to the principal thing and not to the secondary one: and (the divorce shall be caused or not, as the case may be as laid down in the previous paragraphs), because writing is spoken of with reference to what is of importance, and what is important is what is mentioned at the beginning.

2062. (1162.) And if the husband writes the divorce in the middle of the writing (saying "When this my writing reaches thee, then thou art divorced), and he writes necessary matters both before and after the divorce and the husband then strikes out the (clause regarding) divorce, and sends the writing to his wife, the divorce shall be caused, whether the matter written before the clause relating to divorce is shorter or more lengthy (than the matter written after divorce). And Aboo Yusoof, on whom be peace, has held that such shall be the case (that is, the divorce shall be caused), if the matter written before the clause relating to divorce is longer (than the matter written after the divorce clause); and that if the matter written after the clause relating to divorce is more lengthy, then the woman shall not be divorced.

2063. (1163.) And if the husband writes the divorce, at the end of the writing (saying, "When thou receivest this my writing thou

art divorced") and he strikes out what precedes the divorce clause, or strikes out a major portion of the words which precede the divorce clause, leaving the clause relating to divorce intact, the woman shall not be divorced (because the case is that the husband writes "If thou receivest this writing of mine then thou art divorced;" then if he strikes out all that precedes the divorce clause, or a major portion thereof, nothing remains which can be called a "writing.")

2064. (1164.) A man writes to his wife "Every wife of mine excepting thee and excepting so and so, is divorced;" he then strikes out the name of 'so and so' (so that what remains is this, "Every wife of mine excepting thee is divorced") and sends the writing to her, the 'so and so' shall not be divorced (because she has already been excepted and by striking out the clause excepting her, the divorce does not become applicable to her: see Rudd-ool Moohtar, Vol. II, page 704, line 5. A man has a wife called Zynub; he then goes to another town and there marries Aysha; the husband fears Zynub's wrath, and writes to her, "Every one of my wives, excepting thee and excepting Aysha, is divorced;" he then strikes out the words "and excepting Aysha," so that what remains is "Every one of my wives excepting thee is divorced:" Aysha shall not be divorced; but it is necessary that he should make persons attest or be witnesses to the erasure or striking out in order that there might be no doubt left as to what he has struck out, because he might have struck out the portion in such a way as to make it perfectly illegible, when the Kazee would proceed on the writing as it stands, and would decree divorce against Aysha. This is a wonderful device, and what is wonderful is that writing is effectual even after it has been erased or made *muho*: so that the writing as it stands satisfies Zynub, and she understands it in the sense that all the wives excepting herself are divorced, and the husband saves Aysha from divorce by first excepting her from the divorce and secondly by so erasing the excepting clause as to make it illegible).

2065. (1165.) And if he writes to his wife, "Be it known after that (or *Ammabado*, that is, after the praise of God or after the superscription), thou art divorced thrice if it pleaseth God:" then if the words, "If it pleaseth God," have been joined in writing to the preceding words (and written without any break in the space), the woman shall not be divorced: but if he writes the divorce clause and then leaves a space and then writes, "If it pleases God," his wife shall be divorced, because writing by an absent person is like the address (or speech) of one who is present, and in the

case of an address (or speech) the exception (that is, the words "if it pleaseth God") is effective if it is joined to the preceding clause, and it is not effective if it is disjoined. (See also Futawai Alumgiree, Vol. I, pages 533 and 534: see paragraphs 1488 and 1495 *post*, as regards the effect of the exception or *istisna* in speech. See Rudd-ool Moohtar, Vol. II, page 838, if a man says verbally, "Thou art divorced," and *writes* immediately after he finishes his speech without a stop or break, "if it pleases God," then the exception is valid, and the divorce shall not be caused; if he *writes* the words, "Thou art divorced," and immediately *pronounces and utters* the words, "If it pleases God," then also the exception is effective and no divorce shall be caused; if he writes the expression, "Thou art divorced, if it pleases God," and then strikes out or erases the words, "If it pleases God," then also the exception shall be effective and no divorce shall be caused; therefore there are four aspects of the case;—*first*, if he writes both the divorce and the exception;—*secondly*, if he utters both;—*thirdly*, if he writes the divorce and utters the exception;—and *fourthly*, if he utters the divorce and writes the exception; in all these four cases no divorce shall be caused. In the use of the exception it is not necessary that the exception, in order to be effective, should be intentionally used: so that if it is used without an intention, as for instance, when it comes out of the lips quite unintentionally, even then it is effective, and no divorce shall be caused. (See also paragraph 997).

2066. (1166.) And if the husband writes to his wife, "When thou receivest this my writing, then thou art divorced," and the writing reaches her father, who receives it and tears it, and does not make it over to her; then if the father is transacting all her affairs on her behalf, and her father receives the writing in the city in which she resides, the divorce shall be caused; because the reaching of the writing to the father whilst he is transacting her affairs is like the reaching of the writing to herself; but if such is not the case (*i.e.*, if the father is not acting on her behalf and is not transacting all her affairs), the divorce shall not be caused as long as the writing does not reach her; but if the father (in the event of his not having authority as shewn above) gives information to her of the writing having reached him, then if the father makes over the writing to her, whilst the same is torn but so that it is possible (to join the pieces together and) to understand the writing and read it, the divorce shall be caused on her, otherwise not.

2067. (1167.) A man is compelled by being beaten and impri-

soned to write a divorce to his wife so and so, daughter of so and so, son of so and so, and he writes that his wife, "So and so, the daughter of so and so, son of so and so, is divorced:" his wife shall not be divorced; because writing takes the place of speech when necessary, and there is no necessity in this case (but if the man was made to say so under compulsion, his wife shall become divorced).

2068. (1168.) As regards a man who is dumb, when he is unable to write although he has signs well known in his dealings; according to analogy no act of his shall be effective relating to divorce, or emancipation, or sale or like matters, in the same way as the acts of a sick man, whose tongue has become incapable of clear articulation (*Sukeel*) in consequence of his sickness; and this is the view of Malik and Ibn-i-Aboo Laila, on whom be peace; but according to us (Aboo Huneefa and his two disciples), these acts (that is, divorce, emancipation, sale, &c., by the dumb) shall be effective by his fixed signs, in the same way as they are effective by his writing; because there is no hope as regards one who is dumb that he shall speak, and therefore sign must take the place of speech in the same way as writing takes the place of speech. God knows best.

CHAPTER II.

ON CONDITIONS IN DIVORCE.

SECTION I.

ON CONDITIONS IN GENERAL RELATING TO DIVORCE.

2069. (1169.) [NOTE.—See Rudd-ool Moohtar, Vol. II, page 809. Condition or *Taleek*, according to dictionary, means to render a thing dependent on another; according to *Shera* or law, it implies *rubt* or connecting the *hosool* or realization or existence of the meaning of one sentence with the realisation or existence of the meaning of another sentence; as for instance, when a man says, "If you enter the house, then you are divorced;" here the realisation of the idea contained in the sentence "You are divorced," that is the existence of the divorce of the woman is connected with the realisation or existence of the fact involved in the sentence, "If you enter the house." A condition is also metaphorically or by way of *Mujaz* called an oath or *Yumeen*. It is necessary

for the validity of a conditional formula that the condition should be non-existent, so that its existence at present is a matter of doubt and not so that its existence is either certain or impossible; as for instance when a man says, "If you enter the house, then you are divorced," here the condition is valid, because the entry in the house is at present non-existent, but it is such that it may or may not happen or come into being; but if the husband says, "If the sky is above the earth, then you are divorced," here the condition is certain in its existence and is already in being or *Kain*, and therefore the divorce is not conditional at all; on the other hand, in such a case the result is that the divorce is caused at once; here there is no real *Taleek* or condition, but there is *Tunjeez* or the causing of the divorce instantly. If the condition is impossible, then it is void, and there is no divorce at all; as for instance, when a man says, "If the camel should enter the eye of the needle, then you are divorced;" here the condition is impossible or *mahal*, and there is no divorce at all; on the other hand, the connecting of the divorce or making it dependent on such an impossible condition is void or *lugho;* because the object of making the divorce dependent on a thing which is impossible is to negative the existence of the divorce, and not to bring it into existence].

A man says to his wife, "Dost thou intend (or desire) that I should divorce thee," she says "Yes;" he then says (in Persian), "If thou art my wife, (then) one divorce, and three divorces, and a thousand divorces, (and adds on in Arabic), Get up and go away from me;" the husband says that by this he did not intend divorce (upon her, not having referred the divorce to his wife): the word to be accepted shall be his word; because he does not (in the expression used by him) refer the divorce to her (not having said that the divorce is *on thee*).

2070. (1170.) A man says to his wife (in Persian), "If thou goest to the house of thy mother (then) divorce on thee;" the woman goes up to the door of the house of her mother and does not enter the house: the Mashaikhs (learned Doctors) have differed in this matter; and the correct view is that the woman shall not become divorced, because people by the use of such expressions, intend prohibition from entering the house, and the woman shall, therefore, not become divorced unless she enters the house.

2071. (1171.) A man says to his wife (in Persian), "If thou doest an unlawful act (that is, if thou hast sexual intercourse) with anybody, (and completes the sentence in Arabic) then thou art divorced," the

husband then (also) gives her a complete (*bain*) divorce; he then during her *Iddut*, has intercourse with her (which is unlawful because the divorce was *bain*): the learned lawyers have said, arguing by way of analogy from the view taken by Aboo Huneefa and Mahomed, on whom be peace, that the woman shall become divorced (that is, one further divorce arising on the happening of the condition mentioned in the conditional formula will take effect, so that he shall have now left to him the power of giving one more divorce to the same woman before invoking the aid of the legaliser—every husband having the power of three divorces in reference to the same woman: and the case put is that of sexual intercourse within the period of the *Iddut*, because the relationship does not cease altogether before the expiry of the *Iddut* although the divorce might be a *bain* or complete divorce, but the power of the husband over the wife subsists to a certain extent, so that before the *Iddut* has expired he can give her a divorce, and therefore the condition in the conditional divorce is capable of taking effect, but if the *Iddut* has expired, then the parties become strangers, and the condition cannot possibly take effect). And the learned Doctors have rendered this case a branch of (and as arising from what Aboo Haneefa and Mahomed have laid down in) the case in which a man says to his wife, "Every woman that I shall marry, shall be divorced," and he then gives her a complete (*bain*) divorce, and then (again) marries her; here the woman shall become divorced, according to the two (*i.e.*, Aboo Huneefa and Mahomed) in consequence of the words (used, *viz.*, "*every woman* that I shall marry") being general; whereas she shall not be divorced according to Aboo Yusoof, on whom be peace, (and therefore in the case under consideration in the beginning of this paragraph, the woman shall not become divorced) and this view (of Aboo Yusoof) has been accepted by the Doctor Aboo Leith, on whom be peace, (as regards the result in the case of "Every woman that I shall marry") because apparently the man does not intend to include her by his asseveration (or oath "Every woman that I shall marry, shall be divorced.")

2072. (1172.) A man says to another (in Persian), "My wife is from me, with three divorces, if thou do not come to me as my guest." The lawyer Aboo Jaffer, on whom be peace, says, that this condition (although it is in a negative form, and although it relates to the will of another) is valid just as if he says (in Arabic), "If thou do not come to me as a guest, then my wife is divorced" (the expression being used by way of inducement to the guest to accept the invitation).

So also if his wife has been accused of having picked up (that is stolen) a thing, and the husband says (in Persian), "Thou from me art with three divorces if thou hast not picked up this" (the expression being used to induce her to make the admission), the fact being that the woman has not picked up the thing, she shall become thrice divorced; because the expression makes the condition of the divorce to depend on the absence of the picking up (and to make a condition dependent on a negative is allowable) according to (*Oorf* or) ordinary parlance (just as to make a condition dependent on an affirmative is valid).

2073. (1173.) A man says (in Persian), "If I take a wife excepting so and so, then I have given a thousand divorces," or says to a strange woman (in Persian), "If I marry excepting thee," or says, "If excepting thee, I (will) have a wife, (and completes the sentence in Arabic by saying) then she is divorced," he then marries a woman and then marries another; the first woman (married after the asseveration) shall be divorced and not the second (woman, although married after the asseveration); because when he does not say, "Every wife that I may have excepting thee," then in that asseveration (that is, the one first mentioned, *viz.*, "If I take a wife excepting thee," or "If I marry excepting thee," or "If excepting thee I will have a wife"), no woman except one woman is included, and therefore when the man marries the first wife (that is, the first in addition to the one referred to in his asseveration), the man commits a breach of his oath, and the divorce is caused and his oath comes to an end (that is, its force is lost or spent) and therefore the second wife (married after the asseveration or oath) shall not become divorced: (but if he had said, "Every woman whom I shall marry," then all the wives married afterwards would became divorced).

So also if he says (in Persian), "If there (will) be a wife to me in this world, then three divorces on her," and he marries a woman: she shall become divorced; and if he marries a second wife, the second wife shall not become divorced, because this asseveration (or oath) comprehends but one woman.

2074. (1174.) A man (addressing his wife) says to his wife (in Persian), "A thousand divorces, if thou do such and such an act," intending thereby a condition (that is, the causing of a thousand divorces on condition that she does the act): the learned lawyers have said that the divorces shall not happen on the condition being realised (because the asseveration does not say "A thousand divorces on *thee*"), nor shall this

expression have the effect of (*Tunjeez* or) causing instantaneous divorce. But if he says (in Persian), "If thou do such an act (then) a thousand divorces," (without saying "A thousand divorces on *thee*"), intending thereby the happening of divorce (to the woman) on condition she does the act, this (that is, this expression in which the condition is mentioned first) is a conditional divorce (and the divorce shall be dependent on the condition).

But according to the new school (*Mootakhireen*), the divorce shall be dependent on the condition in both cases (and shall apply to the woman addressed although the word "*thee*" is omitted), because (in the second case) the expression is considered to be a conditional divorce when the condition is mentioned first, only because the address is involved in it by implication (that is, it means "A thousand divorces *on thee*," because she is the person addressed), and it is therefore fit (and proper) that, where the condition is mentioned last, the expression should also be considered a conditional divorce, the address being here also involved by implication (so that the expression means "on thee a thousand divorces").

2075. (1175.) A man says (in Persian), "If I ever cultivate in this village, then (he goes on in the Arabic), my wife shall be divorced:" the learned lawyers have said that if in the village the man cultivates grain, or *Falees* or cotton, he shall break his oath (or asseveration), but if he irrigates the field or cuts the crops, he shall not break his oath; so also if he turns up (or digs) the soil and does not sow the crop, he shall not break the vow. And if he gives the land to another person (by the contract of *Moozariut*) to cultivate, or if he hires a labourer, and the labourer cultivates the soil, then if the taker of the oath is one who himself tills the soil, he shall not break his oath unless he means (at the time he expresses his oath as aforesaid) that he will not order somebody else to do the act, in which case he shall break his oath.

And if his slave cultivates the land, or if the labourer does it, in case the slave or labourer was in the habit of doing so for the man before he took his oath, then the man shall break his oath, unless he contemplated (in his expression of oath) the doing of such act himself (as contradistinguished from the act of his slave or labourer, and then he shall not break his oath).

2076. (1176.) A man says to his wife (in Persian), "Thou art divorced, that I have done this act," (that is, "as I have done this act") or says, "That I have not done this act," the husband having made a true

statement (as regards his having done or not done the act); the *Mashaikhs* have differed in this matter: most of them, amongst whom is Sheikh-ool Imam Aboo Baker Mohamed, son of Fuzul, on whom be peace, have said that this is (*Tunjeez* or) an expression by which instantaneous divorce is caused, and that it is not an expression of conditional divorce except when the expression is used at a place where conditional divorce is only expressed in that way (and in case the expression is conditional, the meaning of the two expressions respectively is this; "I have done this act, if I have not done it, thou art divorced;" and "I have not done this act, if I have done it, thou art divorced"); whilst others have said that the same is an expression of conditional divorce; and that which shews that this (latter) view is correct in the following tradition from Aboo Yusoof, on whom be peace:—"A man says to his wife (in Arabic), 'Thou art divorced, that I have entered the house,' and this is an oath, just as if he had said, 'I have entered the house; if I have not entered the house, then my wife is divorced.'"

And the meaning (or equivalent) of this in Persian is the following, "His wife be with divorce that he has done this;" (meaning thereby "I have done this act; if I have not done it, my wife is divorced"), and therefore if he has done the act, he does not break his oath, but if he has not done the act, he breaks his oath. And according to our practice (or *Oorf*) such an expression is used in expressing a conditional divorce; thus the Kazee administers the oath on the defendant thus (in Persian), "By God, that thou dost not owe the thing to him" (meaning you take oath "I swear I do not owe," so that if he owes, he breaks the oath).

2077. (1177.) A man says to his wife, "Thou art divorced, thou shalt not enter the house;" this is equivalent to his saying, "Thou art divorced, if thou shalt enter the house."

2078. (1178.) And if the man says, "Thou art divorced, thou hast entered the house:" the woman shall at once be divorced, because no word has been found used by the husband which is expressive of a conditional divorce.

2079. (1179.) A man says to his wife, "Thou art (that is, shalt be) divorced; if thou shalt enter the house, I shall verily divorce thee:" this is an oath as regards her divorce if he should not divorce her on her entering the house (the meaning of the expression being, "If thou shalt enter the house, then I shall divorce thee, and if on thy entering the house, I do not divorce thee, then thou art divorced"); just as if he

had said, "When thou shalt enter the house, I shall divorce thee, and then thou shalt be divorced, (and if I do not then divorce thee, thou shalt be divorced"); and, therefore, when she enters the house, it is obligatory on him to divorce her; so that, if he does not divorce her until the woman dies or the husband dies, the divorce shall be caused (that is, the divorce shall be caused just as he or she is about to die, and immediately before death takes place; because until such moment arrives, it cannot be said that the husband has not exercised his power of giving divorce).

And this is equivalent to what a man says (to his wife), "If thou shalt enter the house, then my slave shall be free if I do not strike thee," (that is, "If thou enter the house and I do not strike thee, then my slave shall be free," in which case the slave shall not be free if on the wife entering the house the husband strikes her; but if she enters the house and the husband does not strike her, then the slave shall be free only when it is beyond the power of the husband to strike, and that is immediately before his death).

2080. (1180.) A man says to his wife, "Enter the house and thou art divorced;" the woman enters the house: she shall become divorced.

So also if he expresses himself in like manner to his slave (saying "enter the house and thou art free"). Because what follows the imperative with the conjunction "and," is similar to what follows a condition with the word "then" (that is, the expression—"Enter the house and thou art divorced" is equivalent to the expression—"If thou enter the house, then thou art divorced").

And for this reason if a man says to his slave, "Pay me a thousand and thou art free," this is expressive of a condition (dependent on the) payment of a thousand.

2081. (1181.) A man takes an oath in Persian saying, "At the time (that is *hur gah*) that I do this act, then such and such:" in Persian, expressions of this nature are, "at the time that (or *hur waqt*)," and "at the moment that (or *hur gah*)," and "at what time that (or *hur chai gah*)," and "at the period of time that (or *hur zuman*)," and "at a time that (or *humeen*)," and "at any time (or *humaisha*)," and "at every time (or *hur bar*"); one of these expressions involves a repetition of the breach of the oath with each repetition of the act according to the view of all the Doctors and that is the expression "*hur bar* or at every time that;" just as if the man were to say in Arabic, "*Koolluma*, or every time that I shall enter the house, my wife shall be divorced;" so that if he enters the house

several times, the divorce shall be repeated with the repetition of the entry: and in other expressions besides (that is, besides the expression "every time") that is, in the expressions "*hur zuman*," and "*hur gah*" (which are the Persian rendering of the word *Muta*, which means, "when," or "at the time when"), there is no repetition of the breach of the oath with each repetition of the act, and the man shall not break his oath excepting once, just as if he says (in Arabic), "When (*Muta*), I shall enter the house," or "the time when (*Muta ma*), I shall enter the house," "my wife shall be divorced," in which cases the man does not break his oath except once.

And some of the Doctors have held that if the man uses the expressions, "*Hur suman*," or "*Hur gah*," there will be repetition of breach by the repetition of the act; because the man's expression "*hur*" is the equivalent of (the Arabic word) "Every" (*Kool*) and "Every time," (*Koolluma*); and therefore the word "*hur*" shall be comprehensive (of each act) and shall be general: and others have held that the breach shall not be repeated except when the man says, "Every time (*hur bar*)," and this view is reliable.

And Mahomed, son of Mookatil of Rye has, in translating the (Persian) expressions "*hur bar*," and "*hur suman*," and "*hur gah*," said that these expressions are equivalent to expressions (in Arabic), "Every repetition (or *Koollo murrutin*)" or "Whenever (or *Koolluma*)," and therefore the man shall have committed a breach with every repetition (of the act).

And the man's expression, "if or *agur*," and "if or *ar*" are similar to the conditional expression "if or *in*" and "*lou* or if," in the Arabic as when the man says, "If (*i.e.*, "*in* or *lou*,") thou enterest the house;" and therefore the breach of the oath will be incurred but once; and the expression "*Hameen*" (in Persian) is similar to the (Arabic) expression *Muta* (which means "If or at the time that"), and therefore by the use of that expression, the man will commit breach but once; so also the expression *Humaisha* (in Persian) is similar to the (Persian) expression (*Hameen*), and both mean the same thing; just as the (Arabic) expressions "*Muta*" and "*Muta ma*" (meaning 'the time when') are one in meaning, and by their use the man commits only one breach.

2082. (1182.) A man says, "As often as (*Koolluma*) I shall sit (or be sitting) near thee, my wife shall be divorced;" he then sits near her for a time: the woman shall be divorced thrice, because duration (or length) in sitting and in all acts which require length of time for their

performance, is equivalent to renewal (of the sitting and of the act every time that the same lasts; and therefore a divorce is being caused and is recurring every portion of the time that the man remains seated, and thus there shall be numerous divorces, and so three, which is the highest number, shall be taken to have been caused).

2083. (1183.) And if a man says, "Whenever (or as often as, *i.e.*, *Koolluma*,) I shalt strike thee, thou shalt be divorced;" he then strikes her with both the hands at once (and so the striking might be held to constitute one act of striking; and the case assumed is one in which he does not strike her one after the other, because if he had done so, there would undoubtedly be two strokes, and consequently two divorces): she shall be divorced twice; but if the man strikes her with the palm of one hand (although he might strike her with the palm and the fingers), she shall not be divorced except once, although the fingers might have fallen separately (*i.e.*, occupied several places on the body of the woman [when the hand struck her); because where he strikes her with both his hands, there results a plurality of strokes, as the stroke caused by each hand is a separate stroke; and therefore striking with both hands, is similar to the stroke by a single bunch (in which case the strokes caused would be as many in number as the number contained in the bunch): but in the second case (*i.e.*, where the man strikes with one hand so that the open palm with several fingers fall on different spaces on the body, so as to lead to the view that here also there are different strokes) the strokes are not repeated, because the principal thing by which the stroke is given (here) is the palm of the hand, and the fingers are dependent on the palm (*i.e.*, go and act with the palm,) and therefore the strokes are not repeated.

2084. (1184.) A man says to his wife, "As often as (*i.e.*, *Koolluma* or "as many times as," or "whenever") I divorce thee, thou shalt be divorced;" he then divorces her once: two divorces shall be caused, that is, one divorce by the act of the husband in giving the divorce and another divorce by (the condition expressed in) his expression, "As often as I shall divorce thee, thou shalt be divorced."

But if he says, "As often as (or *Koolluma*), my divorce, (*i.e.*, the divorce in my ownership or over which I have power), shall be caused (or be operative) on thee, then thou art divorced;" and he then divorces her once: the woman shall become divorced thrice.

And if he says, "When I shall divorce thee once, then that (divorce), shall be complete (or *bain*)" or he says, "Then that (divorce) shall be

three divorces;" and then he divorces her once, after he has had sexual intercourse with her (because, before intercourse, the divorce that is given is always *bain*, even if the husband were to say otherwise): the woman shall get one reversible (or *Rujue*) divorce in the case in which he had used the expression, "then that (divorce) shall be complete (*bain*)," and also in the case in which he had used the expression, "Then that divorce shall be three divorces (or become triplicate divorce." See paragraph 991).

2085. (1185.) And if he says, "When I shall divorce thee, then thou shalt be divorced, and when I shall not divorce thee, then thou shalt be divorced," and he does not divorce her until he dies: the woman shall become twice divorced at the last moment of his life; because when the man has not divorced her, he has committed a breach of the oath (or asseveration) contained in the second portion of his (conditional) oath, and therefore one divorce shall be caused on the woman (in this way); and when the man commits a breach in the second portion of his (conditional) oath, he commits a breach of the first portion of his (conditional) oath (that is, the first condition also comes to be realised), and thus a second divorce also comes to be caused on her.

2086. (1186.) And if the man first says, "When I shall not divorce thee, then thou shalt be divorced," and then says, "And when I shall divorce thee, then thou shalt be divorced;" and he does not divorce her until he dies: one divorce shall be caused by the first (conditional) oath, and the divorce, which is so caused by the first (conditional) oath, being antecedent to the second conditional oath, is not capable of being a condition for the breach (or realisation) involved in the second conditional oath; because conditions are kept in view in regard to a future time and not to the past; and, therefore, only one divorce shall be caused.

2087. (1187.) A man says to his wife, "If I do not divorce thee this day thrice, then thou art divorced;" he then desires that his wife should not become divorced, and (at the same time) that (he should be within his oath, that is to say, that) he should not commit a breach of his oath: the learned lawyers have said, that the device in this matter (to accomplish his end) is that which is reported from Aboo Huneefa, on whom be peace, the Fatwa being according to the same, *viz.*, that the man should say to his wife on the same day, "Thou art divorced thrice for (that is *ala* or for or on condition of payment by thee of) a thousand dirhems;" and when the man says so to her, the woman should say to him, "I do not accept this;"

and when the woman says so, and the day expires, the husband shall have carried out his oath (that is, he shall be deemed to be released from his oath, and he shall be considered to have given his wife three divorces although he made the divorces conditional on her payment of a thousand dirhems), and (at the same time) the divorces shall not be caused; because (as a matter of fact) he did divorce her that day thrice, although the divorce was not effectual on the woman in consequence of her refusal; and the circumstance that the divorce was ineffectual does not take the speech of the husband (to the effect, "Thou art divorced for a thousand dirhems") out of the category of divorce, (that is to say, he shall be considered to have done the act of having given divorce although the divorce was not in effect caused). Dost thou not see that Mahomed, on whom be peace, says in his work; A man says to his wife,—"I divorced thee thrice, for, (or *ala*, *i.e.*, on condition of payment of) a thousand dirhems, and thou didst not accept (the same)" but the woman says—"I did accept" here the word to be accepted shall be that of the husband, and the divorce shall not be caused on the woman; thus what the husband did here is called an act of divorce, although the divorce never was effective; and this is so (that is, there may be an act of the husband giving a divorce without the divorce being effectual); because the act of divorcing is of two kinds; divorcing for consideration of property (*mal*), and divorcing without consideration of property; and what had to be done on the husband's part (that is, the performance by him of the act of divorce) was verily completed, and that was the giving of divorce (because the expression, "Thou art divorced for a thousand dirhems" does not mean that divorce shall be caused in future, or only if the woman should pay a thousand dirhems, but it means I have divorced thee and thou must pay me a thousand dirhems, and, therefore, if she pays the thousand dirhems, she becomes divorced without any further act of the husband real or constructive); contrary to the case of a conditional divorce, because what is dependent on a condition is non-existent before the realisation of the condition, and, therefore, before the realisation of the condition, the pronouncing of divorce itself was non-existent (the principle being that, in case of conditional divorces, when the condition is realised, a constructive pronouncement of the divorce then takes place); but the man's expression "Thou art divorced for (*ala*) a thousand" is present (establishment of an act of) divorce, because the word, "for" (or *ala*) does not require that the thing mentioned before

it should be non-existent; on the other hand, it requires the existence of what is mentioned before, for instance, if it is said to a man, "I have respected thee (*akrumtokai*) for (*ala*) that thou shalt respect me;" this expression requires the existence of respect at first on the part of the man who says so, (and it does not mean, "I shall respect thee, if thou shalt respect me"); but if he says, "I shall respect thee, provided (*ba aan*), thou shalt respect me," this expression, (*ba aan*), does not require the existence of respect on the part of the person who says so; on the other hand, it requires respect from him only after the existence of respect on the part of the person spoken to; so that the person who speaks in effect says, "If thou shalt respect me, I shall respect thee."

2088. (1188.) And if the husband says to his wife, "If you shall ask me for your divorce this night, and I do not divorce you, then you are (*i.e.*, shall be) divorced thrice," and the woman says, "If I do not ask you for divorce this night, then all I possess shall be gift (*sudka*) on the poor;" the woman then asks for her divorce that night, and the husband says to her, "You are divorced, if you please," and the woman says, "I do not desire it," and the night expires: the woman shall (by this device) not be divorced, and the husband shall be within his oath (*i.e.*, shall not have committed a breach of his oath).

And if the woman (in the above case) asks him for her divorce that night, and the husband says, "You are divorced, if you enter the house," and the night expires, and she does not enter the house: the woman shall be divorced (thrice by virtue of the aforesaid oath); because the making of the divorce dependent on her desire, is entrusting her with (the power to) divorce (herself), and for this reason (in cases in which divorce is entrusted to the woman) the authority (of the wife to divorce herself by reason of the husband having vested her with the power to divorce herself) is confined to the meeting (so that she must exercise her power at the same meeting, if at all); and to divorce is to withdraw the vinculum (*Rufai-kaid*); and in order that an act may amount to a withdrawal of the vinculum, there is a distinction whether the husband himself divorces the wife or entrusts the divorce to her; but making the divorce dependent on the wife's entering the house, or on any other like condition, has not a similar effect (*i.e.*, it has not an effect similar to that which entrusting the wife with the power to divorce herself has), because making the divorce dependent on the wife's entering the house, does not amount to entrusting the wife with the power to divorce herself; and, therefore,

in the case where the husband makes the divorce conditional on her entering the house, it is not necessary that the condition should be realised in the same meeting (and the wife should enter the house in the same meeting in order that she might become divorced); and therefore in the case where the husband makes the divorce conditional on her entering the house, the divorce does not reach her hands (*i.e.*, it does not proceed from the husband to the wife in either of the two modes pointed out, so that the husband might be said to have done an act of divorce within the meaning of his oath), and the husband does not become a giver of the divorce, and he shall, therefore, be held to have broken his oath.

2089. (1189.) A man says to his wife, "If I talk about your divorce, then my slave shall be free," and he then says, "If you desire, then you are divorced," and the woman says, "I do not desire (the divorce):" some of the learned lawyers have said that the man's slave shall become free, because the condition of the freedom of the slave is the man's talking about (or making mention of) the divorce, and such a talk is verily found.

So also if a man says to another, "If I talk about (or make mention of) the accusation of your whoredom, then my slave shall be free," and he then says, "You are a whoremonger (*i.e.*, you are likely to commit *zina*), if it pleases God." (Here although there is a talk about accusation of whoredom, but there is no accusation by virtue of the exception contained in the final expression); the man's slave shall be free.

So also if he says, "If I talk about (or make mention of) *Shirk* (idolatry)," and then says, "Verily *Shirk* is a great sin, (or *zooloom*, *i.e.*, oppression against one's own self, the expression being a text of the Koran)."

And Hassun, on whom be peace, says, that regard is to be had to intention in all these cases (so that if, at the time he utters the words, "If you desire then you are divorced," his intention is that the slave shall be free as the consequence of his uttering those words, then the slave shall be free) and that the man (by giving utterance to those words) shall give rise to such consequences as result from his intention; so that if he does not intend anything (*i.e.*, intends neither the freedom of the slave nor the absence of such freedom at the time he gives utterance to those words), I do not see how he shall have committed a breach of his oath.

And the lawyer, Aboo Leith, on whom be peace, says, I rather accept the first view (*viz.*, that which has no regard to intention, so that when

he talks about the divorce, the consequence follows, and the slave shall become free).

And others have adopted the view of Hassun, on whom be peace.

2090. (1190.) A man says to his wife, "If I take an oath regarding your divorce (that is, if I ever express myself making your divorce dependent on anything), then you shall be divorced," and he then says to her, "If you enter the house, you shall be divorced if it pleases God, the Most High:" he shall not have committed a breach of his oath (contained in the sentence, "If I make an oath, &c.,") and his wife shall not be divorced; because the exception (that is the expression, "If it pleases God,") at the end of the sentence, renders void the effect of what has preceded (*i.e.*, it avoids the meaning of "Thou art divorced," because who can say whether it pleases God that she should be divorced) and when the divorce becomes void, the oath (contained in the expression, "If you shall enter &c.,") becomes void, because the oath (or conditional expression contained in the words, "If you enter, &c.,") cannot be found without the effect (or *Juza*, *i.e.*, sequence).

And for this reason if a man says, "If I admit my liability to so and so in respect of ten dirhems, then my wife shall be divorced," and he then says, "I owe to so and so ten dirhems except one (*i.e.*, ten minus one)," he shall not commit a breach of his oath (although he makes mention of the word "ten,") because he does not make an admission in favor of the other regarding the ten, but only makes an admission regarding nine (the oath not being expressed in this form, *viz.*, "If I make mention or speak or talk about ten dirhems then, &c.," but being in this form "If I admit ten dirhems then, &c.")

2091. (1191.) And if the husband says, "If I take an oath regarding your divorce (that is, if I express myself making your divorce dependent on anything), then you shall be divorced;" he then says, "You are divorced, if it pleaseth God the Most High:" she shall become divorced according to Aboo Yusoof, on whom be peace; but she shall not be divorced according to the view of Mahomed, on whom be peace; because, according to the view of Aboo Yusoof, on whom be peace, the man's expression, "Thou art divorced, if it pleaseth God the Most High," is an oath (or conditional expression) by reason of the existence of a condition and an effect (in the expression used); but according to the view of Mahomed, on whom be peace, the expression is not an oath (or conditional expression, because

the condition is merely in form but not in substance, as nobody can predicate as regards the will of God).

And the result of the difference becomes apparent in certain cases, one of which is this very case (as stated above); and another case is when the husband says, "If it pleases God, thou art divorced," then divorce shall be caused (instantly) according to the view of Aboo Yusoof, on whom be peace; because (according to him) if the condition takes precedence over the effect, the divorce is connected only with the words constituting the effect; so that if the husband says to his wife, "If you shall enter the house, you are divorced," this (according to Aboo Yusoof) will cause immediate divorce; whereas according to Mahomed, on whom be peace, the exception (that is, the words, "If it pleases God") is valid, whether it precedes or follows (see paragraph 1498 *post*,) because according to him, the exception (that is, the expression, "If it pleases God") is a thing which renders void the effect of the expression, and is not (in reality) a conditiona expression, and therefore the exception is valid (and will have effect given to it) in all cases (*i.e.*, the effect is rendered void, and there will be no divorce by the use of the expression, "if it pleases God").

2092. (1192.) A man says to another, "I have got a necessity from you, will you remove it (that is, I want you to do something for me, will you do it)" the other man says, "Yes," and he takes an oath regarding divorce or freedom to satisfy the necessity for him (saying "If I do not remove your necessity, then my wife is divorced or my slave is free"); the man then says, "My necessity from you is that you should divorce your wife thrice:" it is competent to the (other) man (the husband) not to confirm (or believe) the other (that is, it is competent to him to say, "no, this is not your necessity,") because he (the first man) can be (properly) accused (of having made a false statement regarding his necessity, as it is no necessity for a man that another should divorce his wife).

2093. (1193.) A man makes another to swear that the latter shall obey the former in all things that the former shall command him to do, and in all things that he shall prohibit him from doing; the former then prohibits him from having intercourse with his wife; but the person who takes the oath, has intercourse with his wife: he shall not commit a breach of his oath, unless there is something else here which operates as a cause for the prohibition of intercourse; because ordinarily people do not, in practice, imply by such an oath a prohibition of in-

tercourse with the wife, in the same way as they do not imply (from such an oath) the prohibition to eat and drink.

2094. (1194.) A man takes an oath as regards the divorce of his wife, if he does not divorce his wife (saying, "I will not divorce my wife; but if I do divorce her, she shall be divorced"); the husband then makes *Ela* with her (saying for instance, "I swear by God I will not have intercourse with you for four months"), and the period of the *Ela* expires, and the divorce on account of the *Ela* is consequently caused on her: another divorce shall be caused on her as the effect of his oath.

2095. (1195.) And if the husband takes an oath (*i.e.*, makes a vow) that he shall not divorce his wife (saying, "I will not divorce my wife; if I divorce her, she shall be divorced,") he being impotent; the Kazee then separates the husband and wife, in consequence of his impotency, (and this separation amounts to a divorce): the husband shall not have committed a breach of his oath; because the divorce caused as the effect of the *Ela* is attributed to the husband (as in paragraph 1194), but not so the divorce caused, by the Kazee having effected a separation, in consequence of impotency, although both are divorces.

And the lawyer Aboo Jaffer, on who m be peace, says that (in the case in paragraph 1194) the husband does not commit a breach of his oath, in the case of the Ela.

And in the case of *Lian* (or proceedings before the Kazee, in consequence of false accusation by the husband), the man shall be held to have committed a breach of his oath according to analogy from the view of Aboo Huneefa and Mahomed, on whom be peace; but he shall not commit a breach of his oath according to analogy from the view of Aboo Yusoof, on whom be peace.

And the lawyer Aboo Leith, on whom be peace, says, "And it is proper that the husband shall be held not to have committed a breach in the case of *Lian* according to the concurrent view of all the (three) authorities."

And we give *Futwa* accordingly (that is, according to the views of Aboo Leith), in the same way as the husband is not held to have committed a breach of his oath in the case of the impotent that is in the case of his impotency) when the Kazee effects a separation between the husband and wife, although such separation amounts to divorce.

2096. (1196.) A man says (in Persian), "If I withhold the hands of this woman (*i.e.*, if I make her unlawful to me) as long as

this son is alive, then my slave is free"; he then makes *Khoola* with her: he shall have committed a breach of his oath.

2097. (1197.) A man swears that he shall not divorce his wife (saying for instance, "I will not divorce my wife; if I divorce her, she shall be divorced or my slave shall be free," or "I swear by God I will not divorce her") and then a *Fuzoolee* (or volunteer) makes *Khoola* with her (that is, gives her her *Khoola* or divorce as on behalf of the husband without the latter's authority) and the husband receives intelligence (of such a *Khoola*); if the husband permits the *Khoola* (expressly or) by word of mouth, he shall commit a breach of his oath; but if he permits the *Khoola* by his acts, saying nothing by word of mouth but accepting the consideration for the *Khoola*, the learned lawyers have said that the husband shall not commit breach of his oath and this view is reliable. And this matter (that is, the ratification of the *Khoola* of the *Fuzoolee*) and the permitting (or ratifying) of the marriage contracted by the *Fuzoolee* (or volunteer) stand on the same footing (that is, both are capable of ratification by word of mouth or by acts).

2098. (1198.) A man swears a serious (or severe) oath (Aiman-i-Mooghulluza) that he shall not divorce his wife (saying, for instance, "I will not divorce my wife; if I do, then she shall be thrice divorced, or then all my wives shall be divorced"); he then desires to be freed from his wife without committing a breach of his oath (that is, he desires to get rid of his wife, without divorcing her; because if he were to divorce her, then he would commit a breach of his oath, and the serious consequences of a breach of oath would then follow): then the devise in this matter is that he might marry an infant who is still sucking milk (that is, a girl less then 2½ years of age), and direct his (first) wife's sister, or his (first) wife's mother to suckle the infant wife, so that the infant wife becomes the daughter of the man's (first) wife's sister, or becomes the daughter of his (first) wife's mother; the husband thus becomes one who has joined two sisters (in marriage) or has joined his wife (*i.e.*, the infant wife) and her (the infant wife's) maternal aunt (*i.e.*, the first wife); and therefore the marriages of both shall (according to paragraphs 276 and 313, &c.) become invalid (and the result will be that the man gets rid of his wife and at the same time escapes from the consequences of his oath).

2099. (1199.) A man says to his wife, "You are divorced, if you enter this house (pointing to a house) and if you enter this (pointing to another house) other house." (The sense of the expression being

that the clause "You are divorced" governs both the conditions and is the effect of both); then if she enters either of the houses, she shall become divorced, and if she enters the second house (that is, second house, counted with reference to her entry) whilst she is in her *Iddut* (on account of divorce from entry in the house she entered first) no second divorce shall be caused (on account of entry in the second. The expression used only requires one divorce, which is caused by entry in any one of the houses; so that if she enters the other house, even whilst she is in her *Iddut*, no divorce shall be caused; and if the *Iddut* expires, the relationship ceases, and entry after the relationship has ceased entails no consequences).

So also (the same result follows) if the husband says, "If you enter the house (that is, this house), then you are divorced and if you enter this other house."

2100. (1200.) And if he says, "Thou art divorced once, if thou enter the house; twice." (Note—The word *twice* is connected with the word divorce, the meaning being "thou art divorced once, if thou enter the house; thou art divorced twice; the last being a sentence wholly unconnected with the first). Two divorces occur at present, and one divorce shall occur when the woman shall enter the house; but if he does not say "Once," but says "Thou art divorced if thou shalt enter the house twice," two divorces shall be caused when the woman once enters the house.

2101. (1201.) And if he says to his wife, "Thou art divorced once, if thou shalt desire twice;" then if the woman desires twice, she shall be divorced once.

2102. (1202.) And if the husband says to his wife, "Thou art divorced, if thou enter the house; thou art divorced:" one divorce is caused instantly and the first mentioned divorce (*viz.*, that involved in the conditional expression), shall be caused when she enters the house.

2103. (1203.) And if he says, "Thou art divorced, if thou shalt enter the house; thrice," the word thrice, shall be connected with the word "Divorce", except when the husband intends that the word shall be connected with "Entry." (In the first case, that is, without any other intention, the meaning is, "Thou shalt be thrice divorced, if thou enter the house:" and in the latter case, the meaning is "Thou shalt be divorced if thou thrice enter the house").

2104. (1204.) And if he says, "Thou art divorced, if thou enter the house ten times:" then this expression "Ten times" means "entry ten times," and the expression is not connected with divorce (so as to mean ten divorces).

2105. (1205.) And if the husband says, "Thou art divorced, if thou enter the house; thou art divorced, thou art divorced;" and this he says before he has had intercourse with his wife: she shall be divorced once, instantly, by virtue of the second expression (*viz.*, the expression, "Thou art divorced" occurring after the conditional expression; because the first being a conditional expression, will only apply when the condition is fulfilled; the second comes into force at once, because there is nothing to prevent its operation, and the third becomes useless, the woman being one with whom the husband has not had intercourse, and therefore only one divorce is sufficient to put an end to the relationship of husband and wife): and if he (again) marries the woman (who had thus been divorced as aforesaid) and the woman then, after marriage, enters the house, she shall become divorced by reason of the conditional expression which is efficacious only when it is uttered whilst the man has power as husband over the woman: and it is capable of being effectual in case of re-marriage with her, provided this second marriage is such that she has had no other husband in the meantime; for if she has had one, then the re-marriage with the first husband gives the latter fresh power, and he obtains full power of three fresh divorces, and all conditions expressed while the first relationship existed are avoided).

2106. (1206.) A man says, "His (that is, My) wife is divorced thrice, if he enters the house (that is, if 'I enter the house') to-day;" and two witnesses depose (before the Kazee) that he did enter the house (that day, and the Kazee accordingly decrees three divorces): the oath-taker, (that is, the husband the swearer) says, "My slave is free if these witnesses have seen me entering the house" (that is, he swears and says, "These witnesses have not seen me enter the house; if they have seen me enter the house, then my slave is free:") his slave shall not become free in consequence of the statements of those witnesses that they saw him enter the house until two other witnesses, different from the first two witnesses, depose that the first two witnesses saw the man enter the house (because the first two witnesses become plaintiffs in regard to the emancipation of the slave, and their claim must be proved).

So also if the swearer says as regards the first two witnesses, "My slave is free, if the two witnesses have not deposed against me falsely," his slave shall not be free (until two fresh witnesses shall be examined).

2107. (1207.) A man says to his wife, "Inform me regarding such and such a matter;" she says "No," (I will not inform thee); the husband then says, "If thou shalt not inform me, then thou art (*i.e.*, thou shalt be) divorced thrice." Mahomed, on whom be peace, says, that this oath shall enure for ever, unless he intends present time (that is, the oath shall be perpetual in its duration and it shall be her duty to inform him whenever the event takes place; but if he intends the information to be given at once, then his oath shall not have reference to a future event, but shall be referred to a past event, and his meaning would be "If thou dost not inform me of the event which has taken place, thou art divorced.")

2108. (1208.) A man says to his wife, "Thou art divorced, if I speak to thee for a year; go away thou, Oh! enemy of God:" it is said (by Mahomed) that he has verily spoken to her (after his oath, by telling her "Go away thou, Oh! enemy of God") and that he has committed a breach of his oath.

2109. (1209). A man says to his wife "If I call thee, 'Oh thou whore' then thou art divorced;" he then calls her son "Oh thou son of a whore:" his wife shall become divorced. But if his intention was confined to addressing her directly, he shall be confirmed as between him and his God (that is, there shall be a moral justification for him, and there shall be no breach of his oath as between him and his God), but he shall not be confirmed (or justified and believed) by the Kazee (who shall decree a breach of oath and consequent divorce).

2110. (1210.) A man says to his wife before having intercourse with her (*i.e.*, with whom he has not had intercourse) "When thou shalt have menses, then thou art (that is, shalt be) divorced:" the woman then says "I have got menses" and she then and there (*i.e.*, without waiting for three days) marries (another husband, which she could well do, because she was not obliged to observe the *Iddut*, her husband having had no connexion with her); she then dies: Mahomed, on whom be peace, says, that her inheritance shall go to the first husband (because she married within three days, without waiting to know whether it

was really menses that she had, or that she bled on account of some ailment,—*see* Rudd-ool Moohtar, Vol. II, pages 830 and 831) and not to the second; because he says it cannot be said (with certainty) whether what she called menses was really so.

2111. (1211.) A man has a wife, who is a daughter (that is, a girl), of fourteen years of age, and also a slave who is a son (that is, a boy) of fourteen years of age; the man says to his wife, "When thou art with menses, then thou art divorced;" and he says to his slave, "When thou shalt have * * then thou art free;" the girl says, "I have (just) got my menses," and the slave says, "I have * * * :" it is said (by Mahomed) that the girl shall be confirmed (and believed), but the slave shall not be confirmed (or believed); because, says he, in the case of the slave, it is possible to see how * * * * * (and therefore the mere statement of the slave without his offering evidence goes for nothing), but as regards blood which flows * * * * it cannot be known that it is menses, and nobody besides her can know of the menses, and, therefore, her word shall be accepted.

2112. (1212.) A woman says to her husband, "Divorce me, divorce me, divorce me;" and the husband says, "I have divorced thee:" if the husband intends one divorce, then the divorce shall be single; and if he intends three divorces, then the divorce shall be triple.

But if she says, "Divorce me, and divorce me, and divorce me," and the husband says, "I have divorced thee:" this shall amount to three divorces; (because without the copulative conjunction, the second and third expressions might be *Takeed* or repetition of the first divorce only).

2113. (1213.) So also if she says, "Authorise me, authorise me, authorise me (to divorce myself)," and the husband says, "I have verily done so," and the woman divorces herself: this shall be a single divorce.

But if she says, "Authorise me, and authorise me, and authorise me (to divorce myself)," and the husband says, "I have verily done so," and the woman divorces herself: this shall be triple divorce.

2114. (1214.) A man says to his wife, "If I shall have intercourse with thee, as long as thou art with me, then thou art divorced thrice;" he then thinks of a device (to get out of his rash oath): Mahomed, on whom be peace, says, he might divorce her by way of a complete

(*bain*) divorce, and then instantly marry her; he can then have intercourse with her without committing a breach.

2115. (1215.) A man says to his wife, "Thou art divorced, although thou might enter the house (*i.e.*, whether you enter the house or not):" she shall become immediately divorced.

But if he says, "If thou shalt enter the house, thou art divorced," or says, "Then if thou shalt enter the house, thou art divorced," (and does not say, "If thou shalt enter the house *then* thou art divorced): she shall (also) be immediately divorced in these cases.

2116. (1216.) And if the husband says, "Thou art divorced, if," without adding anything further: she shall become instantly divorced, according to Mahomed, on whom be peace; but according to Aboo Yusoof, on whom be peace, she shall not be divorced.

So also if he says, "Thou art divorced thrice, or not," or says "and but (if *Zyd* enters the house)," or says, "If it be" or says, "If it be not (that *Zyd* enters):" she shall not be divorced according to Aboo Yusoof, on whom be peace, and this view has been accepted by Mahomed, son of Sulma, on whom be peace.

2117. (1217.) A man has got stammering or has (impediment or) heaviness of (*Sikl*) tongue, such that he is unable to complete a sentence except after a long interval of time; he makes a vow of divorce (that is, uses the conditional expression) mentioning the condition or the exception (that is, the phrase "If it please God") with exertion and effort: then, if he is known to have the defect of speech, the condition and exception expressed by him shall be valid (that is, the rule is, that the condition or exception must be expressed immediately after the divorce clause, so that if time intervenes, and the condition or exception is not connected with the effectual clause, the latter operates immediately without regard to the condition or exception; but if he delays in giving expression to the second clause in consequence of defect of power of utterance, both shall be taken as connected).

2118. (1218.) A man says in Persian, "My wife is divorced, if I" and cuts off the sentence (*i.e.*, does not complete the conditional clause): Abool Kasim, on whom be peace, says, divorce shall not be caused, just as Aboo Yusoof, on whom be peace, has held. (See paragraph 1216).

2119. (1219.) A man says to his wife, "Thou art divorced for ever, except to-day:" she shall be divorced immediately just as if he had said, "Thou art divorced with divorce such that the same shall not be caused on thee to-day."

2120. (1220.) A man says, "Every wife of mine is divorced, except this," he having no other wife except her: his wife shall not divorced.

2121. (1221.) A woman says to her husband, "Divorce me thrice," and the husband says, "thou art divorced:" this shall be a single divorce unless he intends triple divorce; but if he says, "I have done so," she shall be thrice divorced. So also if he says, "Verily have I divorced thee" (*i.e.*, "Verily have I divorced thee as thou wished").

2122. (1222.) And if the woman says, "Divorce me," and the husband says, "Verily have I divorced thee," intending triple divorce; this shall be a single divorce.

2123. (1223.) And if the husband says to his wife, "Divorce thee thyself," and the woman says, "Verily have I done so," the husband intending triple divorce; this shall be triple divorce.

2124. (1224.) A woman lays claim against a man that she is his wife, and the man takes an oath concerning the divorce of his other wife, that this wife (in question) is not his wife (saying, this woman is not my wife, but if she be my wife, then my wife, Zynub, shall be divorced); the plaintiff then adduces proof by witnesses that she is his wife, and the husband then says, "This woman was (formerly) my wife, but I (have already) divorced her:" it is said (by Mahomed) that the man shall not commit a breach of his oath.

2125. (1225.) A man claims some property (or *mal*) from another man; the defendant swears on his wife's divorce that nothing is due to the plaintiff against him; and two witnesses depose that a thousand dirhems are due, and the Kazee decrees against the defendant a thousand dirhems in favor of the plaintiff, the defendant saying that nothing is due to the plaintiff from him: the swearer (the defendant), shall commit a breach of his oath, according to Aboo Yusoof, on whom be peace; but he shall commit no breach according to Mahomed, on whom be peace.

And if the plaintiff's witnesses depose that the plaintiff lent the defendant a thousand, and the Kazee makes a decree against him for a thousand: then the man shall not commit a breach of his oath according to both Aboo Yusoof and Mahomed (the difference in the two cases probably arises on account of the form of the oath; in the first case the witnesses depose regarding the *ayne* or essence of the debt, that is to say, they depose regarding the fact of the present indebtedness, and, therefore, the state-

ments of the witnesses directly contradict the defendant: but in the second case the witnesses depose to the *subub* or cause of indebtedness, whereas the statement of the defendant had reference to the fact of indebtedness, there is, therefore, no contradiction in this case between the defendant and the witnesses, because it may be true that the defendant did borrow and it may also be true that he is at present not indebted as he might have paid off the debt during the interval).

2126. (1226.) A man swears regarding divorce (saying his wife is divorced if he has done such and such), and he commits a breach of his oath, but he cannot find out (owing to failing memory) whether the oath he has taken related to one or three divorces. Aboo Yusoof, on whom be peace, says, he shall exert his memory (and think over the matter, and try to find out what his oath was—*Tuhurry*) in this matter, and he shall act according to the result; but if his mind be equally divided (and he is unable to give preference to either side of the question) he shall act upon the superior (or larger) number (that is, decide upon three divorces) to be on the safe side.

2127. (1227.) A man says to his wife, "If thou enter the house, then thou art divorced," and he then says to his other wife, "And thou art divorced:" the second wife shall become divorced instantly (because this latter expression is complete by itself), and the divorce of the first wife shall depend on the entry.

And if he says to a strange woman, "If I marry thee, then thou art divorced," and he then says to a wife he has, "And thou art divorced:" his wife shall become instantly divorced.

And if he says to a strange woman, "If I marry thee, then thou art divorced," and he then says (pointing) to his wife "and this:" then each of the expressions shall remain dependent on the marriage (that is, the divorce of the wife already married shall also become dependent on the marriage of the other woman).

2128. (1228.) A man says to his wife, with whom he has had intercourse, "Thou art divorced and thou," or says, "Thou art divorced or thou," or says, "Thou art divorced, then thou:" his wife shall be once divorced, unless he intended by the second expression, a second divorce, in which case, the second expression shall also constitute a second divorce.

But if he says, "Thou art divorced, and thou," this last portion of the expression being addressed to his other wife; or says, "or thou" (ad-

dressing his other wife), or says "then thou:" they both shall become divorced. And if the man says, "I did not mean divorce by the second expression," he shall not be confirmed by the Kazee.

2129. (1229.) And if he says, "Thou art divorced and you both," adding, with the wife he first addressed, another wife of his: the first wife shall become divorced twice, and the second wife shall become divorced once. When he has joined with the first woman, a woman who is susceptible of a divorce by the man, the first woman shall, by reason of the second expression, have a divorce similar to that which has been rendered obligatory on her companion.

So also if he says, "Afterwards (or *Soomma*) you both," or says "Then you both."

2130. (1230.) And if he says to his wife, "Thou art divorced, not but (or *la bul*) thou" (addressing the same woman all the while): the woman shall be divorced once by reason of the first expression, and she shall not be liable to a second divorce by the second expression, unless he has an intention.

And if he says, "Thou art divorced, not but you both:" the first wife shall be divorced twice, and the second wife shall be divorced once.

2131. (1231.) A man has three wives; he says to one of them "When I shall divorce thee, then the other two are divorced (that is, shall be divorced);" he then says the same to the second, and he then says the same to the third; he then divorces the first wife once: the other two shall also get one divorce respectively. And if he does not divorce the first wife, but gives one divorce to the second wife, then one divorce shall respectively be caused on the first and third wife, and then another divorce shall respectively revert to each of the third and the second wife, but except the first divorce (that is to say, except one divorce *viz.*, that involved in the expression "then one divorce shall respectively be caused on the 1st and 3rd wife"), nothing shall be caused on the first wife.

But if the husband does not divorce the first and second wife, but divorces the third wife, then three divorces shall be caused on the third, and two divorces each shall be caused on the second and the first.

[NOTE to Paragraph 1231.—This case has given rise to a good deal of controversy among the Mahomedan Lawyers. See Futawai Alumgiree, Vol. I, page 595, and Futawai Zaineea, page 214: the latter work is rare, and is only to be found in the Library attached to the Calcutta Madrussa, and is a work of considerable authority. It is laid down in the first mentioned authority that in case the husband divorces the third wife

first, the first wife shall have one divorce, and the second wife shall have two divorces, and the third wife shall have three divorces. But the Futawai Zaineea, after noticing the various views to which this case is open, lays down that the rule propounded in the Futawai Kazee Khan is correct. See Rudd-ool Moohtar, Vol. III, page 181. The general rule seems to be this:—Where there is a vow, and the sequence in this vow is to be a condition of another vow, then it is necessary that this other vow should be mentioned first. For instance, if a man has two wives, Zynub and Oomra, and he says to Zynub, "If I divorce Oomra then Zynub is divorced" and he says to Oomra "If thou enter the house, thou art divorced;" then Oomrah enters the house: the result is that Oomra shall get one divorce in consequence of her entering the house; and the divorce of Oomra being a condition for the divorce of Zynub, the latter shall also get one divorce. But if he commences with Oomra and says to Oomra, "If thou enter the house thou art divorced" and then says to Zynub; "If I divorce Oomra, then Zynub is divorced;" and Oomra enters the house: she shall get one divorce, but this divorce shall not revert to Zynub; because at the time the husband made a vow regarding the divorce of Oomra, the divorce of Oomra had not been made a condition for the divorce of Zynub.

So also if having two wives, Zynub and Oomra, he says, "If I divorce Oomra then Zynub is divorced;" and he also says, "If I divorce Zynub then Oomra is divorced." He then begins with Zynub and divorces Zynub, saying "Zynub is divorced:" the result will be that one divorce shall be caused on Zynub by the expression "Zynub is divorced," and one divorce shall be caused on Oomra as the consequence of the condition for the divorce of Zynub; and inasmuch as Oomra's divorce has already been rendered a condition for the divorce of Zynub, another divorce shall be caused on Zynub, and the result, therefore, is that, Zynub gets two divorces and Oomra gets one divorce. But if he begins with Oomra, and says "Oomra is divorced," then Oomra gets one divorce by the expression "Oomra is divorced," and Zynub also gets one divorce as the consequence of the condition for the divorce of Oomra, and there shall be no further divorce.

So also in the cases given in the Futawai Kazee Khan. If the first wife is divorced, she gets one divorce as the result of the direct divorce, and each of the other two wives gets one divorce as the consequence of the condition for the divorce of the first wife, and the divorces of the second and third wives do not revert to the first wife; because such divorces had not been rendered the condition for the divorce of the first wife.

But if he begins with the second wife, then the second wife gets one divorce by the direct expression, and the first and third wives get one divorce each as the consequence of the condition for the divorce of the second wife; and the first wife having thus got one divorce and the divorce of the first wife having been already rendered as the condition for the divorce of the second and third, one divorce more reverts to the second and third wives as the consequence of the divorce of the first wife; and therefore the result will be that the first wife shall get one divorce, and the second and third shall get two divorces each. But if he begins with the third wife, then the third wife shall get one divorce by the direct expression, and the first and second shall get one divorce each, as the consequence of the condition of the divorce of the third wife; the first being thus divorced, her divorce shall revert to the second and third who shall thus get each one more divorce; and the divorce of the second shall also revert to the first and third who shall thus get one additional divorce each, and the additional divorce of the third shall not revert to the first and second; the result will therefore be that, the first and second shall get two divorces each and the third shall get three divorces.]

2132. (1232.) A man has two wives, Zynub and Oomra; he says, "Oomra is divorced at present, *or* Zynub is divorced when I shall enter the house:" the divorce shall not be caused on either of them until he enters the house; (because when the condition is mentioned last, it applies to all the preceding clauses, and, therefore, the divorce of the first wife is dependent on the entry, and the expression "at present" shall give way and convey no meaning). And when he enters the house, he shall be at liberty to cause the divorce on whichever of the two he likes.

2133. (1233.) A man says to his wife, "Thou art divorced or I am not a man," or "or I am different from a man:" the woman shall be divorced; because the man is (in reality) a man; and his expression that he is not a man is false; (and therefore the other part of the expression must be correct and effect must be given to that part).

And if he says, "Thou art divorced *or* I am a man," he is truthful (in the latter expression) and his wife shall not be divorced. (The expression *or* denotes one of two things: here of two things one is affirmed; either "Thou art divorced, or I am a man:" but it is true that he is a man, and, therefore, there is no divorce; because both the two things are not affirmed but only one is affirmed; and one of the two must be true

and the other must be false: but if he says, "Or I am not a man," the falsity of this expression is obvious, and, therefore, the truth of the expression "Thou art divorced" is established).

2134. (1234.) A man says to his wife, whose name is Oomra, "If thou shalt enter the house, Oh, Oomra, then thou art divorced, and Oh, Zynub". Oomra then enters the house: she shall become divorced, and the man shall be asked regarding his intention as respects Zynub; and if he says, "I intended her divorce also," she shall also become divorced (because "Oh, Zynub," might be intended to be coupled with Oomra by the conjunction "and," or it might be the beginning of an independent, but incomplete sentence).

And if the man expresses himself without the conjunction "and," and declares "I intended her divorce along with (that of) Oomra," both of them shall become divorced.

And if he utters the divorce clause first, saying, "Oh, Oomra, thou art divorced, if thou shalt enter the house, and Oh, Zynub," and Oomra enters the house, both of them shall become divorced; and if he says "I did not intend the divorce of Zynub", his word shall not be accepted.

And if he says, "Thou, Oh, Oomra, art divorced and Oh, Zynub:" Zynub shall not be divorced unless the man intended (that she also shall be divorced).

It is said (by Mahomed) "Is it not seen that if a man says, 'For thee Oh, so and so, against (or from) me are (due) a thousand dirhems, and Oh, so and so:' the property (or debt), is for the first; and that if the man makes mention of property first, and says, 'For thee, are (due) a thousand dirhems, against (or from) me, Oh Zyd, and Oh, Salim,' the property (or debt) shall belong to both".

And if he says "Oh, Oomra thou art divorced, Oh, Zynub" then Oomra is divorced and not Zynub, unless he intends Zynub (also to be divorced).

And if he says, "Thou art divorced Oh, Oomra, Oh, Zynub," then Zynub shall not be divorced, unless he intends Zynub (also to be divorced).

And if he mentions their names first, saying "Oh, Oomra, Oh, Zynub, *thou* art divorced," the first shall not be divorced, unless he intends her (also to be divorced).

2135. (1235.) A man says to his wife, "If thou shalt enter the house, if thou shalt enter the house, then thou art divorced," this relates to one entry (that is, if she enters the house once, she shall be divorced, and for the divorce to be caused, two entries are not necessary, because the

repetition shall be considered to have been made by way of *Takeed*, that is to add force).

And if he says, "If thou shalt enter the house, then thou art divorced, if thou shalt enter:" this requires two entries (that is, the divorce shall not be caused unless there are two entries; because the last clause, "if thou shalt enter" having been used after an intervening clause in which the divorce is mentioned, the same cannot be attributed to a repetition merely for the purpose of giving force to the first like clause, as in the first case).

2136. (1236.) A man says to his wife, "If I shall say to thee 'thou art divorced,' then thou art divorced," and he then says, "Verily have I divorced thee;" the woman shall become twice divorced, that is, once by reason of his saying "I have divorced thee," and another by his oath (that is, the conditional asseveration).

2137. (1237.) A man says, "If I shall marry a woman, then she is divorced; and if I shall marry two women (that is to say, together, or in other words, by one contract), then they are divorced;" and he then marries two women together (that is, by one contract): they shall be divorced once each (as the result of the second portion of the oath), and one of them shall (also) be divorced (once more by virtue of the first portion of the oath, so that she altogether becomes divorced) twice, (and the husband shall have the option of selection; but if he had married them by two contracts, then the first wife would have become divorced as soon as she was married, by virtue of the first portion of the oath, but the second wife would have no divorce, because there was *inhilal* or untying of the first portion of the oath, that is to say, its force was lost as soon as the first marriage was found, so that the oath ceased to exist when the second marriage was contracted because "if" does not imply repetition).

2138. (1238.) A man says to his wife, "Thou art divorced, thou art divorced, thou art divorced, if it pleases Zyd;" and Zyd says, "I desire one divorce." Aboo Bakur of Balkh, on whom be peace, says, no divorce shall be caused. And if Zyd says, "I desire four divorces," then the same result follows according to the view of Aboo Haneefa, on whom be peace, (because the husband by repeating the expression thrice intends that Zyd should desire three divorces); but, according to the view of Aboo Yusoof and Mahomed, on whom be peace, three divorces shall be caused, if Zyd says, "I desire four divorces;" (because Zyd's wish to give four divorces includes three divorces also; but if Zyd says, "I desire three divorces"

then three divorces shall be caused, without any difference; because "divorce" was thrice mentioned).

2139. (1239.) A woman is accused of theft; and she directs her husband to take an oath regarding her divorce that she did not steal, and the husband takes the oath (saying, "My wife did not steal, if she did steal, she is divorced"); the woman then says, "Verily did I steal, and thou hast committed a breach of the oath which thou hast taken:" it is open to the husband not to confirm the wife (that is, not to accept her statement that she stole); because her statements are contradictory.

2140. (1240.) A man takes oath regarding divorce if he should ever marry (a woman, who has had intercourse with man) or a Syeeba (saying, "If I ever marry a Syeeba, then she is divorced)," and he marries a woman who (he thinks) is a virgin (Bakirà), but he finds her a Syeeba: the learned lawyers have said that, if the woman confirms him that she was a Syeeba (and not as he expected a Bakira), she shall (become divorced immediately on marriage and shall) be entitled to one dower and a half; that is, one dower by reason of his having intercourse with her (from doubt) and a moiety of the dower by reason of divorce before intercourse as the effect of his oath; but she shall not be entitled to maintenance during her *Iddut* or to residence during her *Iddut;* because she has to observe her *Iddut* by reason of intercourse arising from doubt (or *Shoobha*). But if she falsifies him, saying, "I was a virgin:" then she shall (not become divorced, and she shall) be entitled to one dower (as a wife), and the man shall be liable to maintenance and (to provide) residence (in respect of her as a wife).

2141. (1241.) A man swears regarding his wife's divorce, if his wife were to steal his dirhems for a year; he then gives her dirhems in order that he might see what she does with them (whether she steals them or not); the woman receives the dirhems, and then returns the same to her husband, and picks up (or takes away) one piece without the knowledge of the husband, and the husband asks her, "Hast thou picked up any out of the dirhems" she says, "Yes, (but) not so as to steal," and she returns the piece to him: the lawyer Aboo Baker of Balkh, on whom be peace, says, I am afraid she shall become divorced: and the lawyer Aboo Leith, on whom be peace, says, that if the wife has not (after picking up the piece) separated from him (that is, if she is still in his presence) and does not deny (having picked up the piece), it is fit that she shall not become divorced.

2142. (1242.) A man swears (saying), "If I do not * * * * * * then she is divorced:" the learned lawyers have said, that this (must not be taken literally but) is merely by way of exaggeration and magnifying the number, and does not mean the (exact) number, and that no limit by way of number can be placed in this matter, and ninety times are (to be considered sufficiently) numerous.

2143. (1243.) A man swears that he will * * * * * * (or the expression might mean milk instead of pearl, saying that if he does not do so, his wife is divorced): Mahomed, on whom be peace, was then asked (as to the effect of his oath): he said, I do not know; and Aboo Yusoof, on whom be peace, says, that this means exaggeration * *.

2144. (1244.) A man swears that his wife should not give flour belonging to him to anybody (saying if she gives the flour to anybody, she is divorced), intending her mother specially (that is, meaning that she should not give the flour to her mother specially): Abool Kassim, on whom be peace, says, that, if the husband says (in Persian), "If thou shalt give it to anybody," then (legally, that is, according to the Kazee, the divorce shall be caused, but) he shall be believed as between him and his God in whatever he (says he) intended; but if he says (in Persian), "If thou shalt give it to anybody whatever," then he shall not be believed in his statement of intention (even morally as between him and his God).

2145. (1245.) A man takes oath and says, "If my wife shall wash my clothes (*i.e.*, clothing next to the skin) then she is divorced;" she then washes his sheet: the learned lawyers have said that the man shall not commit a breach of his oath, unless he intended (to include the sheet in "clothes," because ordinarily clothes do not include sheet).

But if a man makes a will regarding his "clothes," then his sheet shall also be included in the will.

2146. (1246.) A man swears that he shall not eat out the property of his son-in-law (saying that, "If I do so, my wife is divorced"); the woman (that is, the daughter of the man) then bakes bread for her father and mixes with the paste (*Ijjeen*), a little of the flour belonging to her husband: the learned lawyers have said that the husband does not commit a breach of his oath.

2147. (1247.) A man swears that he shall not read the Koran (and that if he does so, his wife is divorced); he then reads the Tusmeea (that is, the commencement of the Koran, which is, "In the name of God Most High

and Merciful") and nothing else: Abool Kassim, on whom be peace, says, that if the man reads that Tusmeea which is a part of the Soorai Numul, he commits a breach of his oath, not otherwise; (because in the Soorai Numul, the Tusmeea occurs in the body of the text, and is, therefore, a part of the Koran without any difference of opinion).

2148. (1248.) A man swears that his son shall not be in his house (that is, he shall not allow the son to remain in his house), and that he shall separate him after "to-day;" then when the morning arrives, the son takes himself away and his clothes and his family (and separates himself from his father): Abool Kassim, on whom be peace, says, that if the son has a known room (to himself) in the house, and he vacates the room by removing all his property, the father shall not commit a breach of his oath (but if the son leaves his effects behind him, then the father shall commit *Huns* or a breach of his oath).

2149. (1249.) A man swears that he shall never enter his wife's house; the wife then sells the house to another man, and the swearer then takes a lease of the house and enters into it. Abool Kassim, on whom be peace, says, that if his oath relates to the ownership of his wife, he shall not commit a breach of his oath, but if he swore respecting the house itself, he shall commit a breach of his oath.

2150. (1250). A man calls his wife to his *Firash* (* * * * * * * *); the woman refuses to come, and says, "Verily * * ;" the husband then takes oath that he will not * * ; and the woman then enters his bed (*Firash*) * * * * : then, if * * * * * * and contrary to her inclination * * * * * * he shall commit a breach of his oath; but if he * * * * * * * he shall not commit a breach of his oath.

2151. (1251.) A man claims an animal in the hands of another man, (saying) that the same belongs to him, and takes oath in regard to the animal by reference to divorce (saying "if the animal is not mine, my wife is divorced"); and the man in whose hands the animal is found, says, that "The animal is mine to a certainty." The lawyer, Aboo Jaffer, on whom be peace, says, that the swearer shall not commit a breach of his oath so as to realise the result of (the breach of his oath which is) divorce (simply because the other man says, "It is mine to a certainty"); but the wife shall be cautious, and shall call upon the husband to

swear whether the animal belongs to him or not; and if the husband swears (that the animal belongs to him), she shall remain with him; but if he refuses to take oath, she shall refer the matter to the Kazee, so that the Kazee shall put the husband to his oath that by God his wife has not become divorced (that is, the animal does really belong to him, the husband) but if the husband refuses to take oath, the Kazee shall effect a separation between them.

2152. (1252.) A man swears that he will not drink intoxicating substance for a year; he drinks but not at a meeting of drunkards; and people see him in an intoxicated state, he denying having taken any intoxicating drink; and people bear witness before the Kazee (that the man was found intoxicated); but the Kazee makes no decree (that the man had drunk wine; because in a minor stage of intoxication, the evidence of the *act* of drinking must be forthcoming): Abool Kassim, on whom be peace, says, that it is proper for the Kazee to be cautious, and he ought not to accept the deposition of a man who did not see him drinking; and the man's wife ought to be cautious as regards her person by getting separated from her husband for a consideration.

2153. (1253.) A man says to his wife (in Persian), "If what thou shalt do, shall be to my good or detriment, then thou art so and so (that is, divorced);" she then bakes bread or cooks some other food (and the man eats of the same): the man shall not commit a breach of his oath; (*prima facie* there was a breach of oath, because baking bread which the husband eats is for the benefit of the husband, but the real object is to illustrate that the oath does not include such ordinary and trivial acts).

2154. (1254.) A man keeps his dirhems in the hands of his wife; he then says to her (in Persian), "If thou hast taken any out of these dirhems, then thou art divorced;" it afterwards appears that the woman did take some of the dirhems, and the husband says, "I only expressed myself in that manner by way of an interrogation (or *istafham*) and of causing fear. The lawyer Aboo Jaffer, on whom be peace, says, that if the man had no (particular) intention (when he expressed himself as aforesaid) then he shall commit a breach of his oath (*i.e.*, if he did not intend the causing of fear, as he says, then the woman shall be divorced); but if his intention was to interrogate his wife, the word to be accepted shall be his word, with his oath, (so that there shall be no breach of his oath).

Moulana (the author of these Futawa, namely, Kazee Khan), on whom be peace, says, that it is fit that the man should not be confirmed (or believed)

by the Kazee (when he says his intention was not to divorce), because his expression is an oath in appearance.

2155. (1255.) A man says to his wife (in Persian), "If thou shalt remain my wife to-morrow, then thou art so and so (that is divorced)," then when the second day arrives, she says (in Persian) "I shall not remain thy wife;" the man then in the morning of that day (*viz.*, of what had been called "to-morrow" in the oath or asseveration) makes *Khoola* with her (that is, divorces her for a consideration): some of our Mashaikhs, on whom be peace, have said that, if the husband had no (particular) intention (by the use of the word "to-morrow," whether "to-morrow" should include the whole of the day or only a part of the day) and the husband makes *Khoola* with his wife before sunset of the morrow, he shall have fulfilled his oath (and shall not commit a breach thereof because the woman did not remain his wife for the whole of the morrow, and that is *primâ facie* the meaning of the word "to-morrow," unless the intention is something different); and if the husband marries her (again) after the "morrow," the woman shall become his wife, he having the power of two divorces left to him (one divorce having been lost to him on account of the *Khoola*); but if by his expression, "If thou shalt remain my wife to-morrow," he intended any part of to-morrow (that is, if his meaning was that she should not remain his wife during any portion of the morrow) and he delays the *Khoola* till after the sunrise of the morrow, he shall commit a breach of his oath.

2156. (1256.) And if a man says to his wife, "If thou art (*Tukoonee*, that is, if thou shalt remain,) my wife, then thou art divorced thrice:" then if the husband does not give one complete (*Bain*) divorce immediately after he has given expression to his oath, she shall become divorced thrice. (See paragraph 1062).

2157. (1257.) And if a man says to his wife, "If thou art (*Antai*) my wife, then thou art divorced thrice:" she becomes divorced thrice. And if he says so to his wife, who is observing her *Iddut* consequent upon a reversible divorce, then the same result follows (because, notwithstanding such divorce, she remains his wife during the *Iddut*). If he says to his wife, who is observing her *Iddut* consequent on an irreversible divorce (*Bain*), then, if he means mere marriage, (as it existed before the irreversible divorce) without intending anything else (*i.e.*, without intending to refer to the relationship of husband and wife which only subsists during the *Iddut*), another divorce shall not be caused; (because the divorce being irrever-

sible, the relationship, which subsisted before the divorce, ceases); but if he intends (to refer) to the relationship of husband and wife, which goes on to subsist during the *Iddut* after an irreversible divorce, then another divorce shall be caused (if the irreversible divorce does not consist of three divorces; and the result of this additional divorce would transpire in a second marriage with the same woman).

2158. (1258.) A man says to his wife, "If thou art my wife besides to-morrow, then thou art divorced thrice;" he then divorces her once irreversibly (*Bain*) before the morrow, and the morrow expires, his oath shall become void (that is, no divorce shall be caused as the result of his oath); and it is competent to him to marry her after this (that is, after the "morrow" without the assistance of the Mohullil or legaliser).

2159. (1259.) A woman quarrels with her son-in-law; her husband then tells her (in Persian), "If thou also shalt quarrel with him (or lord it over him), for good or for evil, then thou art such and such (that is, divorced;" the woman then says to her son-in-law (in Arabic) "Either thou shalt divorce her (that is, his wife) or keep her and maintain her." Abool Kasim, on whom be peace, says, that if the son-in-law did not seek the woman's advice in this matter, but on the other hand, the woman herself originated it, then I am afraid the swearer shall commit a breach of his oath.

2160. (1260.) A man says (in Persian), "If I shall remain in this house this night, then my wife is so and so (that is, divorced)," he then immediately looks about to go out, but he is attacked with fever, and he gets into such a state that it is impossible for him to go out of the house, and the morning dawns. Abool Kasim, on whom be peace, says, that the man has committed a breach of his oath. Abool Kasim was then asked "What if the man was confined against his wish?" then Abool Kasim thought over the matter and said, that it is fit that the man shall not commit a breach of his oath according to the view of Aboo Huneefa and Mahomed, on whom be peace, and he differentiated between this case and that of fever, saying, that in the case of fever it is possible for the man to hire a person to carry him and take him out (of the house), or he might ask somebody else to assist him in this matter.

Moulana, on whom be peace, (*i.e.*, the author of the Futawai Kazee Khan) says, that it is fit that the man shall be held not to have committed a breach of his oath in the case of fever also, according to the view of Aboo Huneefa, on whom be peace; because, according to Aboo Huneefa, no

regard is to be had to power derived through somebody else, just as in the case of prayers, and pilgrimage, and purification by resorting to other than water (*Tyummoom*), and such like things.

2161. (1261.) A man says to his wife (in Persian), "If thou hadst been my wife," or "If thou art my wife", "then thou art divorced thrice:" she shall become thrice divorced; and if he (again) marries her after this (after this triple divorce by having recourse to the Mohullil or legaliser), he shall not commit a second breach of his oath; because the oath is satisfied by one of the two conditions (the two conditions being "If thou hadst been my wife" and "If thou art my wife"), and the man shall not therefore commit a second breach (on a second marriage with her); just as if a man says to a strange (or unknown) woman, "If I marry thee or propose to thee, then thou art divorced" and he then proposes to her and then marries her, he shall not commit a breach by the marriage (and by mere proposal, no divorce shall be caused, because the woman was not his wife at the time of the proposal).

2162. (1262.) A man sees his wife embracing her sister and kissing her; he says to his wife, "Dost thou love her, (thy sister) more than thou lovest me;" the wife says, "Yes;" the husband then says (in Persian), "If such is the case, then thou art divorced:" the wife shall become divorced, because love is a thing which cannot be known except by her word.

2163. (1263.) A man says to his wife (in Persian), "If in future thou shalt go out until I order thee to do so, then thou art divorced" (that is, "If thou shalt go out without my order):" Aboo Baker Iskaf, on whom be peace, says, that if the husband intends a separate order each time she is to go out, his intention shall be valid, (that is, she must go out each time with a separate order); and if he intends that she must get his order once (that is, she must once ask him at the time she is first inclined to go out) then the same result follows (that is, his intention is good and she must take his order on her first going out of the house, and no order for subsequently going out is necessary); and if the husband has no intention, (other than what his words imply) then, that (oath) must be referred to her going out once (that is, when she goes out for the first time). Aboo Baker Iskaf then said that, I fear that people by thus expressing themselves might mean the contrary (and might mean that order should be separately obtained for each act of going out).

2164. (1264.) A man says to his wife (in Persian), "Go thou and be my *Vakeel* (or agent) and do whatever thou likest;" the woman says

(in Persian), "If I am thy *Vakeel*, I have withheld my hand from thee by three divorces;" the husband says, "I did not intend that thou shouldst be my *Vakeel* in this matter." Abool Kasim, on whom be peace, says, that if the husband expressed himself as aforesaid, at the time when divorce was being sought (by the woman), the husband's word shall not be accepted and one reversible divorce shall be caused; but if he does not so express himself at the time when divorce was being sought from him, then the word to be accepted shall be that of the husband.

Moulana (that is, Kazee Khan, the author of these Fatawa), says, that it is fit that the divorce should be caused (even when the woman had not sought for a divorce) in consequence of the words used being general.

2165. (1265.) A man being at Baghdad says, "My wife is divorced when (*Ma-um*) I shall not go out towards Koofa," he then waits (at Baghdad) for a moment, except that during that moment he was speaking to the ass-driver in the matter of hire (as a preliminary to going out towards Koofa): the learned lawyers have held that he shall not be held to commit a breach of his oath, and upon this is the Fatwa given; except when the man waits (and stops at Baghdad) without being occupied in making preparations to go out, in which case, he shall commit a breach of his oath; and if he is occupied in purifying himself with water (*wuzoo*) to say his prayers of the *Furz* kind, or the like, then this shall constitute an excuse to stay (and he shall not commit a breach); and prayers of the *Nufil* kind, and eating and drinking do not constitute (valid) excuse, and in these cases the man forfeits his oath.

2166. (1266.) A woman says to her husband, "I have no strength to remain with thee hungry;" and the husband says, "If thou remainest hungry in my house then thou art divorced:" the learned lawyers have said that, if she does not reman hungry without fast, the man shall not be held to have committed a breach of his oath (that is, he shall commit a breach if she is hungry without fasting).

2167. (1267.) A woman goes to a feast, and her husband says to her, "If thou shalt stay there more than three days, then thou art divorced;" the woman returns on the third day towards her husband's village, but goes back again to the feast, and remains there for a few days: the lawyer Aboo Leith, on whom be peace, says, that if she enters the habitable portion of her husband's village at the time she returns (from the feast), and then afterwards goes back to the invitation, the husband shall not com-

mit a breach of his oath; and that if she does not enter the habitable portion of her husband's village, it is fit that the husband shall commit a breach of his oath.

2168. (1268.) A man says to his wife (in Persian), "If thy thread I shall use, or comes to my use, then thou art divorced;" the husband then exchanges her thread with other thread, or exchanges the cloth woven with her thread with other cloth, and clothes himself with the cloth: Aboo Baker of Balkh, on whom be peace, says, that the man shall not commit a breach of his oath.

And if the husband says, "If thy thread I shall use (&c.)," and then uses the cloth woven with her thread, Aboo Baker (another lawyer), says, that he shall not commit a breach of his oath. Then Aboo Baker was asked—if the husband had said, "If thy thread shall come to my use (what then?)" he (Aboo Baker) said, "I am afraid the husband shall commit a breach of his oath."

2169. (1269.) A man says, "If I derive benefit from *this* wheat, then my wife is divorced;" he then sells the wheat and derives benefit from the purchase money: it is said (by Mohamed) that he shall not commit a breach of his oath.

2170. (1270.) And if the husband says (in Persian), "If thy thread shall be on my body, then thou art divorced;" and he puts his hand on her thread, or he sews cloth with her thread, and puts on the cloth, or supports his elbow on her thread, or sleeps on bed made out of her thread: the learned lawyers have said that his oath shall refer specially to the matter of his clothing himself, and the man shall not commit a breach of his oath in these cases.

2171. (1271.) A man swears and says (in Persian), "If I shall give wine *nubeez*) to any person (then my wife shall be divorced);" he then makes a man drink, or makes a present (of wine) to a man: Abool Kasim, on whom be peace, says, that if the man's intention was to make a man drink (by the use of the word *give*) or (merely) to give, then the oath takes effect as he intended; but if he has no intention, then his oath shall relate both to making a man drink and to giving the wine to him.

2172. (1272.) A man says to his wife (in Persian), "If thou shalt take out of my dirhems, then thou art divorced;" the woman then finds the dirhems of her husband in his handkerchief, and gives the same to another woman (without herself touching the dirhems) telling her "take

some of these," and the other woman takes some of the dirhems and then hands over the same to the wife: Abool Kasim and Mohamed, son of Sulma, on whom be peace, have said, the woman shall become divorced.

2173. (1273.) A man says to his wife (in Persian), "If I sleep (or lie in bed) with thee, then thou art divorced," and does not intend anything (in particular): the learned lawyers have said, that his oath shall relate to sexual intercourse, and the man shall be held to have made *Eela*: but if he intends sleep thereby, then the oath shall relate to lying together and not to sexual intercourse, and in this case the man shall not be held to have made *Eela*.

2174. (1274.) A man says (in Persian), "If so and so does not come to my house this evening then my wife is divorced;" he then calls that so and so to his house in order that he (the so and so) might dine with him; the so and so (however) dines at his own house, and then comes to the man who so invited him, and the man who so invited him was waiting for him; the man then eats with the so and so: the learned lawyers have said that the man shall not have committed a breach of his oath (because the expression, "If he does not come this evening" means "if he does not dine with me this night.")

2175. (1275.) A man says to his wife (in Persian), "If this cloth I put on, then my wife is divorced;" the cloth is a shirt; and the man throws it on his shoulders: the learned lawyers have said that the man's oath shall relate to putting on, in the ordinary mode, in regard to such a piece of clothing, and without the ordinary mode of wearing the man shall not break his oath.

2176. (1276.) A man accuses his wife of theft saying (in Arabic) "Verily dost thou steal so many (or this proportion) of my dirhems (then finishing off in Persian), if after this, thou shalt take out of my silver, then thou art divorced;" the woman then takes up (a dirhem) with the broom whilst cleaning the house, and puts it in a corner, and informs her husband of this: the learned lawyers have said that if she takes up the dirhem not to detain it from her husband, it is hoped that the husband shall not commit a breach of his oath.

2177. (1277.) A woman goes out towards a village; and her husband says to her (in Persian), "If thou shalt stay away for more than three days, then thou art divorced;" she then diverges from her path

(leading to that village) and goes to another village, and afterwards goes to the village for which she came out (of her house), and stays there for a few days (*i.e.*, more than three days) : the learned lawyers have said that if she diverges from her path and goes to the other village, and then goes to the first village, the husband shall not commit a breach of his oath.

2178. (1278.) A man says to his wife (in Persian), "If thine (conduct) shall continue with me, such as it has gone on up to the present, then thou art divorced :" the learned lawyers have said that if the expression has reference to some antecedent matter, then the oath shall relate to that antecedent matter; if not, and if the husband intends nothing, then if the husband refuses to agree with her in whatever she fails (to do according to his taste and inclination act up to his view) and never gives in to her in anything, he shall not commit a breach of his oath, otherwise he shall commit a breach of his oath.

2179. (1279.) A man says to his wife (in Persian), "If thy thread, or whatever is done by thee shall enure to my benefit and loss, then thou art divorced;" the woman spins thread and herself wears the cloth (made of the same) and makes her children wear it: the man shall not commit a breach of his oath; so also if the wife, out of the thread, liquidates debt owing from her husband: and the husband shall only commit a breach of his oath when the thread (or cloth made of it) comes under his ownership, otherwise not.

2180. (1280.) A man says to his wife (in Persian), "If the leaves of thy strawberry (or mulberry, *i.e.*, *Toot*) tree shall come to my benefit and loss, then thou art divorced;" the wife then takes some of the leaves and throws them upon the worms (caterpillars) belonging to the husband, without his permission: the husband shall commit no breach of his oath, in the same way as if she were to feed the husband's animals with the leaves without his permission.

2181. (1281.) A man gives a Koran to another to correct mistakes; he says (in Persian), "If this (Koran) comes to my benefit and loss, then so and so (that is, my wife is divorced);" the swearer then recites from that Koran: the learned lawyers have laid down that the man shall commit a breach of his oath. Kazee Khan (the author of these Futawa) says, that by this expression, reference is to the oath of the person who gives the Koran (for correction) who says, "If this Koran comes to my benefit and loss" (and not to the oath of the person who receives the Koran for the particular purpose; because although

the recitation might refer to both, still gift and sale must refer to the giver of the Koran, who is the owner thereof, and, therefore, all the three modes of benefit must refer to the owner).

And if the owner of the Koran makes a gift of the Koran to somebody else, without condition of consideration, and then the donee pays something, by way of consideration, to the donor, the owner shall not commit a breach of his oath, but if he sells it, he shall commit a breach of his oath.

Maulana (*i.e.*, Kazee Khan, the author of this Futawa) says, that it is fit that the owner should not commit a breach of his oath, in case he recites from the Koran; because mere recitation is not intended by his oath; and he says he shall not commit a breach in case of a gift, because when the consideration was not conditioned in the contract, there was no profit made out of the Koran; contrary to the case of sale, because the consideration is in lieu of the Koran, and, therefore, the same stands in the place of the Koran.

2182. (1282.) A man says to his wife, "If thou shalt go out of this house (*Dar* or enclosure) thou art divorced;" the woman goes into a garden of grape trees, the door of which is from the house, there being no other door except the one in the house: the learned lawyers have differed in this matter; some of them have said, that the man shall commit a breach of his oath, and others have said, that if the garden of grapes is a small one so that it might be included under the denomination of "house," and is implied by the mention of "house," then the man shall not commit a breach of his oath; otherwise he shall commit a breach of his oath.

2183. (1283.) A man says to his wife, "If thou shalt enter my brother's house (*Dar* or enclosure), then thou art divorced; the swearer's brother then takes up another residence, and the woman enters this new house: some of the learned lawyers have said that if the husband's oath was out of anger for his right (or claim) appertaining to the first house (which right, for instance, the brother does not acknowledge), the husband shall not commit a breach of his oath; but if the oath was in reference to the brother himself, then the husband shall commit a breach of his oath; but if the husband had no particular intention by his oath, then he shall commit a breach of his oath according to Aboo Huneefa and Mahomed, on whom be peace.

And if the wife enters the house which was owned by the brother at the time of the oath, then, if the house (still) belongs to the brother as owner,

except that he does not live in it (at the time of the entry), the husband shall commit a breach of his oath, but if after the oath, the house goes out of the brother's ownership, by sale or gift, or otherwise, then the husband shall not commit a breach of his oath. And if the brother dies, and his house becomes the inheritance of his heirs, then, if she enters the house after the house has become the property of one of the heirs by partition, the husband shall not commit a breach of his oath; but if she enters the house before partition, the learned lawyers have differed in this matter; but the correct rule is that the man shall not commit a breach of his oath. And if the (brother), owner of the house, dies, and against him is debt which swallows up (*Moostughrik*) the inheritance, and the wife enters the house, then the husband shall commit a breach of his oath.

2184. (1284.) A man says to his wife, "If thou shalt go to such and such a village, then thou art divorced;" and the woman goes to another village, but (in so doing) she passes through the land (*Zyut*) of the first mentioned village: the learned lawyers have said that if she does not enter the inhabited portion of the village, then the husband shall not commit a breach of his oath.

2185. (1285.) A man says to his wife, "If I do not * * * * * * * * * * * * then thou art divorced:" it is reported from the lawyer Aboo Hufs of Bokhara, on whom be peace, that he said that if the husband * * * * * * * * * then verily * * * *.

2186. (1286.) A man says to his wife, "If thou hast unloosened the strings of thy trousers in an unlawful way, from the time that thou hast been my wife, then thou art divorced;" the woman says, "A man * * * * * * * * * * * * * * :" the learned lawyers have said, that if the woman was in such a state so that she could not prevent * * * * then the husband shall not commit a breach of his oath; but if she was competent to * * * * * * then the husband shall commit a breach of his oath, if the husband believes her in this matter (that is, in her statement ;* * * * * * * * * * * * * but if the husband believes that this statement is made to get rid of him, then the oath shall not be broken).

2187. (1887.) A man says to his wife, "If I do not tell thy brother, all the vices in the world, on] thy behalf (that is, 'in thee'

or referring the vices to thee), then thou art divorced:" the learned lawyers have said, that, if the husband says to the wife's brother, assigning to her what are the attributes of vile people and thieves and cheats and murderers, then he shall satisfy his oath, but he shall be sinful in so doing (even if he were making correct statements, because the Koran forbids talking evil of others, even if the evils exist) and his particular oath (expressed by the word "all the vices") shall relate to most of these evil qualities, and the least that will satisfy his oath is a statement of three evil qualities: and the lawyer Aboo Leith, on whom be peace, says, that it is fit for the swearer after he has made a statement of the bad qualities to the brother, to say, that, "I have said so only on account of the oath, but she is free from all these," and by so saying he shall have made repentance for what he had said regarding his wife, and he shall (at the same time) satisfy his oath.

2188. (1288.) A man says, "If I shall bathe on account of (having done) what is unlawful, then my wife is divorced;" he then embraces a strange woman, and * * * and he bathes: the learned lawyers have said we hope that he shall not commit a breach of his oath, and that his oath shall relate to * * *.

2189. (1289.) A man says, "If I shall introduce so and so in my house, then my wife is divorced:" he shall not commit a breach of his oath until that so and so does enter the house by the order of the swearer; but if he says, "If so and so enters my house (then my wife is divorced)," and the so and so enters the house with his permission or without his permission, with his knowledge or without his knowledge, the swearer shall commit a breach of his oath: but if he says, "If I leave so and so to enter my house," and the so and so enters the house with the knowledge of the swearer, and he does not prevent the so and so, he shall commit a breach of his oath; otherwise not.

2190. (1290.) A man says to his wife, "If thou shall speak to such and such a woman then thou art divorced;" then the wife of the swearer is invited to a wedding; and the woman against whom the husband swore, (that is, the woman to whom the wife was prevented from speaking) comes in a veil, and says to the wife of the swearer, "Where is the goat;" and the wife of the swearer says, "Goat ...." and she does not add anything more (that is, before she could say more), and the veiled woman raises her veil: the learned lawyers have said that if the swearer's wife

intended to answer, then she verily did speak to the woman, and the swearer shall commit a breach of his oath.

2191. (1291.) A man says to his wife, "If I shall eat of the milk of thy cow, or of the cow's cheese, then thou art divorced;" the wife then sells the cow to her husband, and then milks the cow, and the swearer eats of the milk: he shall not commit a breach of his oath.

Maulana (Kazee Khan, the author of these Futawa) says, that this is so if the oath relates to the ownership of the woman (but if the particular cow was intended, then there will be a breach of the oath).

2192. (1292.) A man says to a person who was speaking something, "You say this in intoxication;" the other man then says, "My wife is divorced, if I have spoken so in intoxication, and I am not intoxicated:" the learned lawyers have said that, if the man's speech is incoherent and he is deemed intoxicated by people, he shall be held to have committed a breach of his oath.

2193. (1293.) A man in intoxication calls his wife towards his bed * * * * * * * * * ; the wife refuses to come; the husband says, "If thou shalt carry out my order and help me (in what I am about to to do, then all well); otherwise, then thou art divorced:" then, if after this oath, when the man calls her again, the woman helps him, he shall not commit a breach of his oath; but if the man having called her she does not help him, the man shall commit a breach of his oath. Maulana (that is, Kazee Khan, the author of these Futawa), on whom be peace, says, that it is fit that the man should be held to commit a breach of his oath, if she does not help him even when he does not repeat the call (after the oath); because people intend by such an oath, obedience to the order already given.

2194. (1294.) An intoxicated man gives a dirhem to his wife; the woman says, "When thou wilt come to thy senses, thou wilt take it from me;" the husband says, "If I take (it) then thou art divorced;" he then takes the dirhem from her whilst in intoxication: he shall not commit a breach of his oath; because the condition of the breach of the oath is the taking of the dirhem after the intoxication subsides.

2195. (1295.) A number of women are assembled spinning for other than themselves by way of loan of their labor (that is, on the understanding that "I spin for you to-day, you spin for me to-morrow;") then the husband of one of them becomes angry and says to her, "If thou shalt spin

for any other, or if another spins for thee, then thou art divorced;" then some other woman sends cotton to the house of this woman (that is, the woman whose husband has so taken the oath), in order that she might spin it for her; then the mother of this woman spins the cotton: the learned lawyers have said that if this woman can spin herself (that is, if she is in the habit of spinning herself) and somebody else spins the cotton, the divorce shall not be caused on her, on account of the spinning of somebody else.

2196. (1296.) An intoxicated person says to his wife, "I have made a gift of this my house to thee;" he then says, "If I do not say this from my heart, then thou art divorced thrice;" he then after being restored to his senses does not remember anything about it: the learned lawyers have said that his wife shall not be divorced, because it is obvious that what a man says in this state, he says out of his heart.

2197. (1297.) An intoxicated person is told by his wife (in Persian), "Put thy head on the ground;" he says (in Persian), "If I put my head on the ground, divorce to thee" and then heaves a heavy breath (so as to cause a pause) and then says, "Except by my own inclination" (meaning thereby that if I kneel down at your dictation then three divorces to you, unless I do so of my own inclination): the learned lawyers have said that if the interruption (or pause) takes place, because he was out of breath, then the exception is correct, and the bending of his head to the ground by the man's own inclination shall be excluded from the condition constituting breach of oath: but if the interruption did not take place to enable him to take breath, then the exception shall not be correct.

Then if the intoxicated man (after the intoxication subsides) says, "I do not remember anything of all this," then his oath (taken in the intoxicated state), shall be (like) the oath in an angry state (*Yumeen-i-fowr*); because apparently the husband means (*fowr* or) immediate action (that is, he must be taken to mean, "If I *now* bend my head at thy bidding then, &c.").

2198. (1298.) A man says to his wife, "When I shall enter Sham (or Syria) and *when* I do not separate from thee, then thou art divorced: this oath shall be permanent (and divorce shall not be caused until he is *in extremis*, and when it can be said truly of him that he has not separated although he is in Syria). But if he says, "*And if* I do not separate from thee," this oath shall be referred to immediate action (*Fowr*) at the time of the entry (in Syria).

2199. (1299.) A man gives a dirhem to his wife; he then says to her, "What hast thou done with the dirhem?" and she says, "I have purchased meat;" the husband says, "If thou shalt not return to me that (very) dirhem, then thou art divorced;" but the dirhem is lost from the hands of the butcher: the learned lawyers have said that as long as it is not known that that dirhem has been melted or lost in the sea, the man shall not commit a breach of his oath.

2200. (1300.) A man says to his wife, "If thou shalt wash my clothes then thou art divorced;" the woman washes the sleeves or the skirt: the learned lawyers have differed in this matter: the lawyers Abool Leith and Aboo Sulma, on whom be peace, have said that the man shall not commit a breach of his oath.

2201. (1301.) A man divorces his wife completely (*Bain*); he is told by others, "Verily shalt thou take her back (*Ruja*) after a month," (that is marry her again); the husband says, "If I take her back, then she is divorced thrice;" he then marries her (again) during the *Iddut* or after the expiry of the *Iddut*: he shall commit a breach of his oath; (because after complete divorce the way to take back is to marry). But if the divorce was reversible and he then (again) marries her, he shall not commit a breach of his oath (because the taking back after a reversible divorce is effected by means other than marriage).

2202. (1302.) A man says to his wife, "If thou shalt wash thyself on account of impurity (*Junabut*) as long as thou art my wife, then thou art divorced thrice;" he says this twice or thrice; and the woman is pregnant, and the husband has no intercourse with her until her delivery: then if she is delivered after the expiry of four months from the time of the oath, she shall be completely divorced once, by the effect of the *Eela* (because the oath in effect means that, "If I have intercourse with thee," and this is a form of *Eela*) and her *Iddut* shall expire with the delivery; and if the husband has sexual intercourse with her after this (*i.e.*, after delivery) he shall have had sexual intercourse with a strange woman, and he is bound to make penitence and repent with *Istighfar* (pardon and forgiveness from God), and the woman shall be entitled to get her proper dower, if the husband did not know that his expression amounted to *Eela* and that she became unlawful to him, and his oath shall become void (*i.e.*, shall have spent itself); so that if he marries her after this (divorce) the woman shall be his wife, he having (still) in his power two divorces, and

he shall not commit a breach of any oath by having sexual intercourse with her after this (fresh marriage; because there is no oath in force now).

2203. (1303.) A man accuses (*Kuzuf*) a woman of adultery; her husband tells the man, "If you do not prove her adultery to-day, then she is divorced thrice:" then the effect of it is in accordance with what he said, so that if the (other) man does not prove her adultery that day, she shall be divorced thrice: and proof of *Zina* is established by the admission of the woman or by four witnesses.

2204. (1304.) A man says to his wife in anger, "If thou shalt do so up to 50 years thou shalt become (*Tuseery*) divorced;" the woman does so (once): the learned lawyers have said that if the man's oath means divorce of the woman, then divorce shall be caused; but if his oath does not mean her divorce, but (on the other hand) the man so expressed himself to frighten the woman, the divorce shall not be caused; and the word to be accepted shall be that of the husband, that he expressed himself so with intent to frighten the woman.

[NOTE.—*Tuseery* or 'shall become' might mean "thou art divorced," or "I shall divorce thee."]

2205. (1305.) A man says to his wife, "If thou shalt pass the night unless in my *hijr* or (bosom) then thou art divorced thrice;" the woman remains in his bed (*Firash*) during that night, except that the husband did not actually take the woman in his *hijr* or (bosom): the man shall not commit a breach of his oath:

But if he says in Persian, "If thou shalt not come within my embrace (*Kinar*):" the learned lawyers have said that it is fit that the husband should commit breach of his oath; because this expression requires that the woman should actually be in the *hijr* or (bosom).

2206. (1306.) A man says to his wife, "If I do not pass the night with thee, with this thy shirt, then thou art divorced thrice." The wife (also) says, "If I shall pass this night with thee, with this my shirt, then my female slave is free;" the man then puts on her shirt, and both passed the night: they shall not commit a breach of their oath: because the condition of the breach on the part of the woman (of her own oath) is that she should pass the night with him whilst she is in her own shirt, and the condition for the fulfilment of the oath (so as to avoid the consequences of a breach of it) on the part of the man is, that the man shall pass the night with her whilst he is in the woman's shirt: and all these things have

verily been found. (Herein the oath, the words "with this thy shirt" mean that the swearer shall have her shirt on. In the husband's oath, the divorce would be caused if there was an absence of the compound idea of "passing the night with the woman's shirt;" the divorce would therefore be caused, firstly, when the husband does not pass the night, and he does not put on her shirt; secondly, when the husband passes the night with her, and he does not put on her shirt; and thirdly, when he does not pass the night with her but puts on her shirt: and the oath shall be satisfied and divorce shall not be caused when the husband passes the night with her and puts on her shirt).

2207. (1307.) A man says to his wife, "If * * * * * * * * * * * * * * then thou art divorced thrice;" he then says, "If * * * * * * * then thou art divorced thrice:" then the device in this matter is that * * * * * * * * * * so that the husband shall not commit a breach of his oath, as long as the hair band continues to exist whilst they are alive (because the condition "with the hair band," could only be negatived when the hair band ceases to exist or one of the parties is *in extremis*: when the hair band ceases to exist, then it will be impossible * * * * * ; and if one of them dies or the hair band is lost or destroyed, the man commits a breach of his oath. (The case in paragraph 1306 resembles the present case except that in 1306 the case refers to "this night").

2208. (1308.) A man takes oath that he shall not have intercourse (*Jima*) * * * * * the man then * * * * * * * * * * * * * * he shall not commit a breach of his oath, and his oath shall relate to (*Moobazaut* or) * * * * * * * * * * * * * * * the oath is, therefore, against * ; * * * * is excluded from *Jima*. See Vol. II, Ruddool Moohtar, page 160, on Fasts, and see paragraph 1317 *post*).

2209. (1309.) A man swears that he shall not untie the strings (of his trousers) for a lawful or unlawful purpose in journey; * * * * * * *

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* * * then if he intends the primary meaning of untying the string, he shall not commit a breach of his oath, and he shall be believed morally and by the Kazee, if he says such was his intention; because in this case his intention relates to the primary meaning of the word; but if he, by those words, means * * then he shall commit a breach of his oath.

2210. (1310.) A man swears that he will not open his trousers * * * intending thereby * * the man shall become one who has made an *Eela;* but if he does not intend * * thereby, he shall not become one who has made a *Eela.*

And if he opens his trousers for the purpose of urinating, and afterwards * * * * he shall not commit a breach of his oath; because "to open trousers * * " is to open (the same) for the purpose of * * *. And if he opens his trousers for the purpose * * * * but does not * * * ; the learned lawyers have said that it is fit that the man shall commit a breach of his oath, on account of the existence of the condition for a breach of the oath, and that condition is the opening of the trousers for the purpose of * * * *

2211. (1311.) A man swears that he shall not "wash himself on account of this wife of his in consequence of impurity;" he then * * * * * * * * * or * * : he shall commit a breach of his oath; because his oath relates to * *.

And if he intends the primary meaning of washing, * * * * * then also he shall commit a breach of his oath; because he washes himself on account of * * * * and he shall, therefore, commit a breach of his oath, just as if he swears that he will not make ablutions by reason of flow of blood from the nostrils (such flow requiring such purification) and he then makes ablution by reason of flow of blood from the nostrils and for other causes, he shall commit a breach of his oath.

So also if a woman takes such an oath, and her husband then reaches her * * * * and she also gets her menses (then if after both these events she washes herself, she shall commit a breach of her oath).

2212. (1312.) And if the husband says to his wife, "If I shall wash myself on account of thee, in consequence of impurity, then thou art divorced;" and * * * * the divorce shall be caused, although he might not wash himself * * * * * * *

2213. (1313.) A man says to his wife, "If I wash myself on account of thee for a month, then thou art divorced;" he then * * * * * * * * * * * * * * * and purifies himself in a mode which is allowed as a substitute for water (*Tyummoom*): he shall commit a breach of his oath; because his oath means * *

2214. (1314.) And if a woman swears that she "Shall not wash her head on account of impurity arising from her husband;" and she then acquiesces * * * * * she shall commit a breach of her oath; because her oath relates to her (*Tumkeen* or) offering facility willingly * * * * * * * * * * * * * * she shall not commit a breach of her oath.

2215. (1315.) A man says to his wife, "If I shall not * * * * * * * then thou art divorced:" then as long as they are both alive and as long as * is in existence, he shall not commit a breach of his oath.

2216. (1316.) A man says to his wife, "If I do not * * * * * * * * * * * * then thou art divorced thrice;" and he then looks about in quest of a device in this matter: the learned lawyers have rendered the following as a device, *viz.*, that the man should carry her in a covered car (*Ammary, i.e.*, a litter placed on the back of the elephant or camel) and take it to the market * * * *

2217. (1317.) A man says to his wife (in Persian), "If thou hast done an unlawful act (*Huram*), three divorces to thee," and verily had she kissed a man who was not (her *mohurrum*, that is not) unlawful to her, or * * * * * * * * * the husband shall not commit a breach of his oath, because his oath relates to ordinary * *.

2218. (1318.) And if a man says to his wife in Persian, "If thou shalt do an unlawful act with anybody, then thou art divorced;" he then divorces her completely (*bain*), and then has intercourse with her during the *Iddut* (such intercourse being *Huram*): the learned lawyers have said that, according to analogy from the teachings of Aboo Haneefa and Mahomed, on whom be peace, the man shall commit a breach of his oath, and the woman shall become thrice divorced; but according to Aboo Yusoof, on whom be peace, she shall not become divorced: because they (Aboo Haneefa and Mahomed) have regard to the generality of the words ("with anybody") whilst Aboo Yusoof, on whom be peace, has regard to the object the man had in view.

2219. (1319.) A woman swears by God (in Persian), "I have not done *Huram* (or unlawfulness)," and intends thereby that it is not she who has made adultery unlawful but that it is God only who has made (ordained) adultery unlawful: and she verily had committed adultery: she shall not commit a breach of her oath.

So also if a man takes such an oath and intends the same thereby, (he shall not commit a breach); because he intends a meaning of which the words are susceptible; but if the man swears with reference to divorce or freedom of a slave (or if the woman swears with reference to the freedom of a slave) he (or she) shall not be believed and confirmed by the Kazee (and the divorce or emancipation shall take place; because ordinarily the oath refers to adultery or *Zina*).

2220. (1320.) A man says to his wife, "If thou shalt commit unlawfulness (*Huram*) then thou art divorced thrice;" she then utters (*Koofr* or) infidelism (the result of this *Koofr* being the cancellation or *Fuskh* of the marriage) without either of them knowing that each has become unlawful to the other (on account of her infidelism) and both of them continued to be so (ignorant) for a few days: the man shall not commit a breach of his oath, because his oath had reference to adultery (*Zina*), and verily he has had intercourse with her on account of doubt, and therefore he shall not commit a breach of his oath; (that is, by uttering words of infidelism, the woman became unlawful to her husband and connexion after that was adultery or *Zina*, and, therefore, the oath would have been realised but for the fact that the connexion in this case did not amount to *Zina* on account of doubt) just as if a man swears that he will not commit unlawfulness, but marries a woman by an invalid marriage, and has sexual

intercourse with her, he shall not commit a breach of his oath; because his oath relates to what is absolutely unlawful.

2221. (1321.) And if a man swears regarding his wife's divorce that he shall not look at what is unlawful, and he looks at the face of a strange woman, he shall not commit a breach of his oath; but if he looks * * *

in the Arabic language, a distinction is made between one who has a beard and one who has not; and this is correct.

2226. (1326.) A man has a pupil, * * * * * * * * * * * * ; the tutor then takes oath * and he takes the oath without carefully ascertaining the matter * * * * ; the father of the pupil then says, "This other pupil says that he saw the tutor whispering to the pupil;" the tutor then says, "If that pupil saw me whispering to him (the son), then my wife is divorced;" and the fact is, that what the (second) pupil saw was that the tutor told him something in a whisper relating to his affairs, *viz.*, that the pupil should make a purchase (for the master) or carry something to the master's house, and that the pupil should not inform anybody else about it: the learned lawyers have said we hope that the tutor shall not commit a breach of his oath; because his oath relates to a secret thing * * * * * * * * * * * * * * * * * * *

in some act, whether the act be sexual intercourse, or embrace or talking: and the man shall not commit a breach without (any one of) these.

2228. (1328.) A woman says to her husband, "Verily did thou sleep with the female slave;" the husband says, "If I slept with the female slave, then thou art divorced thrice;" and the woman says that, "If in this thy oath there is some hidden meaning (which I cannot understand; and by which you might be able to get out of the oath) then I am divorced" and the husband says, "Yes:" then if the husband does not mean something other than what is expressed by his oath, he shall not commit a breach of his oath (and the woman shall not become divorced by reason of the divorce being conditionally entrusted to her); otherwise he shall commit a breach of his oath, and his wife shall become divorced (by virtue of the authority to divorce vested in her by the word "Yes.")

2229. (1329.) It is said to a man, "Verily dost thou commit with such and such a woman such and such an act," and the same woman (with whom he is so accused) is on the roof (*Sutuh*) and there is another woman on another roof, and both the roofs are close to each other, and the night is dark; the man (accused) says, "If I have done such and such an act with that woman (pointing to the other woman, not the one with whom he is accused), then my wife is divorced thrice;" and he does not name the woman, and he points to a woman other than the one with whom he is accused, and the fact is that the man does really the particular act with the woman with whom he is accused: the wife of the swearer shall be divorced so far as the Kazee is concerned; because his expression, in the oath "that woman," refers to the woman who was mentioned before (that is, the woman who is the subject of the discourse); but his wife shall not be divorced morally, on account of the man pointing out a different woman.

So also a man claims property from another man, and the latter denies the claim, and the Kazee gives oath to him thus:—"By God, the swearer does not owe this property to the claimant;" the man takes the oath and points with his finger, which is concealed within his sleeves, to another man to whom he does not owe anything, the man shall not commit a breach of oath morally.

2230. (1330). A woman always abuses her husband; the husband says, "If thou abuse me, thou art divorced thrice;" the wife addressing her infant child born of him says (in Persian), "Oh you born of adultery!" The lawyer Aboo Jafer, on whom be peace, says, that if the

woman says so on account of something disagreeable to her proceeding from the child, she shall not be divorced; but if she says so on account of something disagreeable to her proceeding from the father of the child, then she shall become divorced thrice (because she has abused him calling him a *Zanee* or adulterer. See paragraph 1375 *post*).

2231. (1331.) A man says to his wife, "If thou enter the house of so and so, and so and so enter thy house, then thou art divorced;" the woman then enters the house of so and so, but the so and so does not enter her house, the man shall commit a breach of his oath, because the oath meant either of the two (things referred to therein), and not both the things at once.

2232. (1332.) A man says to his wife, "Why dost not thou wash this cup;" the woman says, "I have washed it;" the man then says, "If thou hast not washed it, then thou art divorced thrice;" the fact is that the woman had ordered her servant to wash the cup, and the servant had really washed it: the learned lawyers have said that if the woman is not in the habit of washing (the cup and other vessels) herself, but is in the habit of getting such work done by a servant, then the husband shall not commit a breach of his oath; but if the woman is in the habit of washing (and cleaning utensils) herself, and the husband intends this (*viz.*, washing by herself), the divorce shall be caused.

2233. (1333.) A man says to his wife, "If I sleep on thy cloth, then thou art divorced;" he then reclines on one of her pillows or lies down on her bedding (*firash*), or supports his head on her elbow (which is covered with her clothing): the learned lawyers have said that if he puts one of his sides or the greater part of his person on her cloth, he shall commit a breach of his oath; but that if he reclines on her pillow or sits on it, he shall not commit a breach of his oath.

2234. (1334.) A man says to his wife (in Persian), "If I make a meal of what is in the pot warmed by thee, then thou art divorced;" she then (merely) warms the pot containing edibles cooked by somebody else, and the swearer eats of it; he shall not commit a breach of his oath: because by warming is meant cooking.

2235. (1335.) A man says to his wife, "If I eat of what is in the pot cooked by thee, then thou art divorced;" the woman then puts the utensil on a stove, which contains fire kindled by the woman, and the swearer eats the thing so cooked: she shall become divorced; but if some-

body else had kindled the fire, then the learned lawyers have entered into a discussion in this matter; and the correct view is, that in this case also, she shall become divorced; because if in a lane there is a stove in which one woman kindles a fire, and other women put their pots on the stove, this amounts to cooking on behalf of each of them; and if there is no fire in the stove, and the woman puts her pot on the stove, and she then kindles fire in the stove, (even then) she shall become divorced, if the swearer eats out of this; but if some other woman kindles the fire, she (*i.e.*, the woman who put her utensil on the cold stove) shall not become divorced; because the putting of the pot on a stove in which there is no fire, is not called cooking; and a fire grate (or small private stove) stands on the same footing.

2236. (1336.) A woman says to her husband, "Come thou, so that thou mayst take thy breakfast;" the man then swears that he will not take his breakfast unless the woman prepares the breakfast with one *kufeez* (a measure) of salt in it: the learned lawyers have said (that the device in this matter is) that the woman shall boil eggs (with the outer shell) in a pot in which there is one measure of salt (so that the excess of salt shall not affect the yolk) and the husband shall then make his breakfast (on the eggs) and he shall not commit a breach of his oath.

2237. (1337.) A man says to his wife, "Verily dost thou spoil all the dishes (or eatables); therefore if I bring eatables to thee for one month, then thou art divorced;" the swearer then brings meat to her for the purpose of being given to the laborers (*Oojurai*; or to the dogs, *Ajurai*): the man shall not commit a breach of his oath, because his oath relates to bringing (eatables) for the use of the house, as the context indicates (*Dulalut*).

2238. (1338.) A man says to his wife, "If thou do not come to me with such and such a thing to-morrow, then thou art divorced;" the woman sends those things (to her husband) through a person: then if the swearer means receiving the things on the morrow and means nothing else, he shall not commit a breach of his oath; because he means what his words are susceptible of; but if he does not intend anything, or if he means that the woman should herself carry the thing (and bring it to him) the man shall commit a breach of his oath; but the mere receiving of the thing will not satisfy the oath unless he so intends.

2239. (1339.) A woman is in the habit of taking the property of her husband and giving it to another woman, in order that the latter might

spin thread for the former; her husband says to her, "If thou takest any thing out of my property, then thou art divorced;" she then takes something out of his property and purchases with it something from the grain-seller, (*Famy*), for the necessities of the house; or there being a neighbour of her, who is in the habit of baking bread in her house, the neighbour wants a little flour, and the woman (whose husband has taken the oath) gives her the flour, or she gives a loan of some bread: then, if the husband does not disapprove of this (*i.e.*, he is not in the habit of taking exception to such trifling acts on the part of his wife), he shall not commit a breach of his oath by the loan, or gift of flour; but in the case of the purchase of things which were necessary for the house, if she has the authority to make purchases from the grain-seller (*Famy*), then the husband shall not commit a breach of his oath; because the husband (as a rule) does not disapprove of this, and he does not intend to include this in his oath; but if the wife has no authority to make purchases herself, then the husband shall commit a breach of his oath, if the woman should, with his property, purchase something from the grain-seller (*Famy*).

2240. (1340.) A man says to his wife, "If thou take my barley (*Shueer*) to send the same to the grain-seller (*Famy*), then thou art divorced;" and he has in his house an animal which is fed on barley, and in front of the animal there is (a handful of) barley, which was left after its meal, and the woman sends this (handful of) barley together with her (own) barley to the grain-seller (*Famy*): then if the husband is not in the habit of disapproving of this (that is, the sending the remnant of barley) he shall not commit a breach of his oath; because such a quantity is not ordinarily included in the oath; but if the husband is niggardly even to this extent, and has regard for that small quantity also, he shall commit a breach of his oath.

2241. (1341.) A man says to his son, "If thou steal anything out of my property, then thy mother is divorced;" the son then steals from his father's house a brick: it is reported from Aboo Yusoof, on whom be peace, that on being questioned regarding this matter, he said, that if the father's avarice extends to this limit as regards his son, his wife shall become divorced; and Mohamed, on whom be peace, on being questioned in regard to the matter, returned no answer; then he (Mohamed) was told that Aboo Yusoof, on whom be peace, has returned this particular answer, he (Mohamed) then said "Who can give such an excellent answer except Aboo Yusoof, on whom be peace."

2242. (1342.) A man says to his wife, "If I give thee a dirhem in order that thou might purchase with it anything, then thou art divorced;" he then gives her a dirhem, and orders her to make it over to so and so, in order that the so-and-so might purchase with it something for the woman: he then recollects his oath, and takes back the dirhem from her: then, if the woman habitually (goes out to the market and) purchases things herself, the man shall not commit a breach of his oath (because he gave her the dirhem to make it over to somebody else to purchase something with it, and the woman is so circumstanced that she can herself make purchases in the ordinary course and is not obliged to purchase through others); but if the woman is not in the habit of purchasing herself, then the husband shall commit a breach of his oath; because purchase by her is to order somebody else to make the purchase for her, when she does not herself personally make purchases.

And this is an example of what we have said (see paragraph 1295), that if the husband says to his wife, "If thou shalt spin for another, then thou art divorced" and the woman asks some other woman to spin for her, the result of this case (*viz.*, that of spinning) is similar to this case (*viz.*, that of purchasing).

2243. (1343.) A man says to his wife, "If thou shalt send any thing from this house to that house, then thou art divorced;" the swearer then orders his slave girl to give to the inmates of that house, whatever they ask for; a man then comes from that house and asks for something, and the slave girl refuses to give, and the master comes to know of this, and disapproves of it (that is, the refusal by the girl) and becomes angry; the wife of the swearer then says to the slave girl "go thou and carry from the house of the master, the best of what was asked for by the inmates of the other house, to the other house," and the slave girl does carry the thing: the learned lawyers have said that if it can be known from other circumstances (*Duleel*), that the slave girl did so for the master (or in furtherance of the wishes of the master) and not in obedience to her mistress, then the swearer shall not commit a breach of his oath; but if it can be ascertained that the slave girl did so in obedience to her mistress, the swearer shall commit a breach of his oath: but if there are no circumstances (to throw light on the subject) then the slave girl shall be questioned, and her word shall be accepted when she says that she did so in obedience to her mistress, or in furtherance of the wishes of the master: this is so laid down in Mohamed's book.

Moulana (Kazee Khan, the author of these *Fatawa*) has laid down that the case can also be put in this way, *viz.*, that if the inmates of the other house ask for the thing from the slave girl, and she refuses and does not give it, and the master is informed of the refusal, and the master disapproves of the course adopted by the slave girl (although he had given no order to the slave girl to give the thing); the swearer's wife then says to the slave girl, "Carry thou from the master's house the best of what was asked for, and take it to that other house;" and the rest of the case is as stated above.

2244. (1344.) A man says to his wife, "If thy mother eats of anything out of my property, then thou art divorced thrice;" the wife then cooks (what is in) a neighbour's pot, and puts in it something which was needed out of her husband's property (such as salt, &c.,) and her mother eats of what is contained in the pot: then if the wife does it (*i.e.*, puts something needed into the utensil) with the consent of the owner of the utensil and with the consent of her husband, the husband shall not commit a breach of his oath; because (in that case) the thing put into the utensil (out of what belonged to the husband) became the property of the owner of the pot.

2245. (1345.) A man says to his wife, "If thou shalt give out of my wheat to any one then thou art divorced;" and he says, "I intended by this expression (to refer to) her mother:" the man shall be confirmed (and believed) morally but not by the Kazee: (he shall be confirmed morally) because he intended to use as particular (*Tukhsees*) what is a general term (*Aam*) and this (intention) is permissible as between him and his God.

And according to the view of Khussaf, on whom be peace, the man's intention shall hold good absolutely (that is, morally as well as by the Kazee) in a case like this (*viz.*, where a general term is used and a particular individual is meant). The learned lawyers have said that this will be so (that is, to use a general term and mean a particular individual) when the man expresses himself in the Arabic language; but if he expresses himself in the Persian languge, then his intention shall not be correct; because it is only in the Arabic language that it is permissible to modify the universality of a general expression (*Tukhsees-ool Aam*). But the correct view is, that there is no difference between the Arabic and Persian languages, and his intention shall be correct as between him and God.

This is so (that is, his intention is correct only morally and not as between the man and the Kazee), when the swearer is not acting under compulsion; but if the oppressor (*Zalim*) compels him to swear, then it is permissible to the swearer to act upon the view of Khussaf, on whom be peace, and to intend (particular or) individual (although he might use a general expression).

2246. (1346.) A man says to his wife, "If thou shalt take dirhems out of my purse, then thou art divorced;" the woman then opens the mouth of the purse and orders her daughter to take out, and the daughter takes out: the learned lawyers have said that it is feared that the wife shall become divorced; because it does sometimes happen that when two persons take dirhems out of a purse, they resort to this mode; and for this reason if a number of persons enter a person's house for the purpose of committing theft, and they take away property and one of them carries the property and brings it out of the house, all of them shall be held to be thieves.

2247. (1347.) A woman takes a dirhem out of her husband's purse and purchases meat with it, and the butcher mixes the dirhem with his other dirhems; and the woman's husband says to her, "If thou shalt not return to me that very dirhem this day, then thou art divorced;" and the day expires (and the dirhem is not returned): the divorce shall take place in consequence of the condition being realised; and if the husband intends to find out a device to get out of his oath, the woman shall take the purse of the butcher (containing amongst others, the dirhem required) and make it over to the husband (who might then give it back).

2248. (1348.) A man says to his wife, "If thou shalt not return to me the dinar (gold mohur) which thou hast taken from my purse, then thou art divorced;" but the dinar is in his purse: the woman shall not be divorced.

2249. (1349.) A *Vakeel*, or a labourer (that is, a husband-man or tiller), takes oath, that he shall not steal, and he takes grapes and fruit and eats them or takes them away to eat: he shall not commit a breach of his oath, because this is not ordinarily understood to be theft; but if he takes them away, not for the purpose of eating, and the owner of the grape-tree has also a share in the grapes (which the man carries home); and the man does not inform the owner of the grape-tree that he is taking the grapes away, and he does not even think of informing of it to the owner he shall commit a breach of his oath, because this is considered theft.

And as regards grain and crops of the thrashing floor (*Khyarzar*), if the labourer or *Vakeel* takes something of it, not for safe keeping, but to appropriate it exclusively, he shall commit a breach of his oath.

And if a person other than a *Vakeel* or a labourer (who has been entrusted with the thing), takes away anything out of these surreptitiously, he shall commit a breach of his oath, because the act amounts to theft.

2250. (1350.) A man is accused of theft of a thing; he then takes oath that he did not steal it or see it; the fact being that he did see it before, but he did not steal it: the learned lawyers have said that his oath shall relate to seeing the thing at the time of stealing, as the circumstances of the oath denote (*Dulalutun*), and he shall not commit a breach of his oath.

2251. (1351.) A man has a (piece of) cloth; and somebody steals it or takes it by force (*ghusub*); the owner of the cloth (for some reason or other), takes oath and says, "If I have such a cloth—naming the cloth—then my wife is divorced:" the learned lawyers have said that if it can be known that at the time of the oath the cloth was destroyed, he shall not commit a breach of his oath (because even if the cloth is not in his possession, it is still his, whoever might be in possession of it by theft or by force); but if it can be known that the cloth was in existence (at the time of the oath), or if it is not known what has become of it (at the time of the oath), then the man shall commit a breach of his oath; because (in case nothing is known of the cloth) the existence of a thing is the natural state of that thing (and it must be presumed to exist).

This case is similar to the case, where a man sells cloth belonging to another person, without the permission of the owner of the cloth, and surrenders the same to the purchaser; and the owner of the cloth afterwards permits (or ratifies) the sale by the man: then, if it is known at the time of the permission that the cloth was in existence, or if it is not known whether it was in existence or whether it was destroyed, the permission (or ratification) shall be valid; but if it is known at the time of the permission (or ratification) that the cloth was destroyed, the permission (or ratification) is not valid.

2252. (1352.) A man buries his property in his house; he then looks for it, and does not find it, and he then takes oath upon divorce that his property is gone (saying, "My property is gone, if it is not gone, then my wife is divorced:") the learned lawyers have said that if some-

body has not taken the property, it is feared that the man shall commit a breach of his oath; because (if somebody has not taken it away) the property has not gone; except when his intention (in the words used in his oath) is that the property is gone, so that he is unable to find it when he wants it.

A washerman has a shop, and cloth belonging to another goes away (or disappears) from the shop; he accuses his laborer; the laborer takes oath in Persian, saying, "If I have brought loss to thee, then my wife is divorced;" and the fact is that the laborer has taken the cloth (to keep, and it has been stolen from him): the laborer shall commit a breach of his oath; because the object of the swearer by the oath was as regards loss to the washerman in regard to that which was in the washerman's hands, and not the deprivation of his ownership.

2253. (1353.) A man enters the house of another and steals cloth from the house, and the owner makes no demand from the thief, so that the thief makes over to the man some dirhems (*e.g.*, to keep for safe custody) and the man denies having received the dirhems and takes an oath. Abool Kasim, on whom be peace, says, that if the cloth has gone away from the hands of the thief, then the swearer shall not commit a breach of his oath (because the one is set off against the other) because he is truthful (having set off the dirhems against the price of the cloth stolen); but if the cloth is in existence in the hands of the thief, even then I do not say that the swearer shall commit a breach of his oath; because, according to the view which some take, it is allowable to the man, whose property has been stolen or usurped, to detain, from the usurper or the thief, the property of the usurper or the thief, until he gets his rights.

Moulana (the author of these Futawa) on whom be peace, says, it is necessary that this answer should be scrutinised, and it is proper that the swearer should be held to have committed a breach of his oath; because when the cloth is in existence, then the right of the person, whose cloth has been stolen, attaches to his cloth and not to the price (or value) of the cloth; and for this reason if the creditor happens to get hold of some property (*Ayn*) out of the properties belonging to the debtor, it is not permissible to him to retain such property, and this is concurred in by all the traditions; but (no doubt) if the creditor has owing to him dirhems from a person, then if the former happens to get hold of the dinars belonging to his debtor, it is permissible to him to retain those dinars, according

to traditions reported in the book on (*Ayn*) Property and (*Dyn*) Debt (in the work of Mahomed), because dirhems, as well as dinars are considered of the same kind (*Jins*) in regard to some purposes of law (*Ahkam*), in consequence of sameness of their object, that object being that they are capable of being used as purchase money. But as regards properties (*Ayan*), they are not held to be of the same kind as purchase-money (that is, dirhems and dinars), in consequence of the difference in form and object.

But it is stated in the book (of Mahomed) that a man pledges some property (*Ayn*) in lieu of debt (owing from him); then the pledgor comes with the intention of taking back the thing (*Ayn*) pledged, from the pledgee, denying the debt he owed to the pledgee, and the pledgor intends to put the pledgee on his oath to the effect that he (the pledgee) has not the pledgor's thing (*Ayn*) in his hands; it is open to the pledgee to swear "by God, I have not with me this thing (*Ayn*) which he claims," intending thereby "I have not with me this thing (*Ayn*) which it is obligatory on me to surrender to him," and he shall not take oath except with this intention: (this supports the view of Abool Kasim in the case of theft in question).

All this is when the cloth is in existence: but if the cloth has been destroyed in the possession of the thief, even then the answer requires scrutiny (and doubt arises as to its correctness); because, according to the view of Aboo Huneefa, the right of the person whose cloth has been stolen is still in existence in the cloth (and not in anything else even) after the destruction of the cloth. And for this reason, if the owner of the cloth compromises in respect of the cloth for double its value, the compromise shall be valid, according to Aboo Huneefa, and the owner's right is only transferred from the cloth to its price (or value) by the decree of the Kazee: and it is possible for the Kazee to make a decree, as regards the value of the cloth, that the same shall be paid in dinars and not in dirhems (and therefore the man had no justification for swearing that he has no dirhems of the thief with him).

2254. (1354.) A man is compelled by thieves to take oath on three divorces, that he has not with him dirhems, other than those taken by them from him; the man then takes oath of three divorces regarding the matter: the learned lawyers have said that if the man has with him less than three dirhems, he shall not commit a breach of his oath because the expression used by him in his oath is dirhems (in the plural) and

dirhems in the plural does not imply less than three; but if he has with him three dirhems or more than three, then if his oath relates to divorce, the divorce shall be caused, whether the swearer knows what he has got or does not know; but if his oath is in relation to God, then if the swearer knows how many he has of the dirhems (that is, he knows that he has three or more than three) then (he shall be sinful but) there is no Kaffara (penalty for false swearing) on him, because his oath is one of the *ghumoos* kind (which is, when a man intentionally forswears himself as to a past event); but if he does not know this (that he has three or more than three) even then there is no penalty on him (but he will not be sinful) because his oath is of the *lugho* kind (which is, where a man swears to his belief of a past event which turns out to be incorrect); but if he takes oath in the Persian language, saying, "If I have a dirhem (&c.)," he having with him one dirhem or more than one, then if the oath relates to divorce, the divorce shall be caused; and if the oath relates to God, then the result shall be what we have stated above.

And if he says, "If I have silver with me," then if he has with him a quantity which, if the thieves knew, they would have taken it away from him, the man shall commit a breach of his oath; otherwise not; because his oath relates to that which the thieves demanded from him.

2255. (1355.) A band of robbers commit highway robbery on a man and take away from him his property, and put him on his oath regarding divorce that he shall not give information to anybody regarding them; then passers-by (*Kafila*) approach him, and he says to them "There are wolves on the highway," and they understand him, and retrace their steps: the learned lawyers have said that if the man intends to imply robbers by "wolves," his wife shall become divorced; because he thus gives the information regarding the robbers; but if he intends the real meaning of "wolves," in order that they might return, then he shall not commit a breach of his oath, because he does not then give information relating to the robbers.

2256. (1356.) A band of people enter at night into a man's house and take away all his property, and give the man oath not to disclose their names, they being (residents) in the same street, and he sees them (constantly): then the device in this matter is what is reported from Aboo Huneefa, on whom be peace! *viz.*, that the man should write down the names of all his neighbours (including the thieves and those who are not

thieves) and he should ask somebody to repeat to him the names, asking him, "Was this the thief," and the man should say, "No," until he reaches the names of the thieves, when he should keep quiet, or say, "I do not know:" the thieves will thus be found out, and the man shall not commit a breach of his oath.

2257. (1357.) A man says to his wife after the break of morn, "If I do not have sexual intercourse with thee to-night, then thou art divorced," and does not intend anything; (the difficulty here arises, because a Mahomedan day commences with the sunset, and therefore "to-night" has already passed away); then if the man knows (at the time of the oath) that the morn has broken, then his oath shall refer to the future night; and if he intends by his oath the past night then, according to Aboo Huneefa and Mahomed, on whom be peace, the oath shall not be contracted (because the oath must be such as to involve a possibility of its fulfilment).

2258. (1358.) A man says to his wife, "If thou shalt rest thy side (an expression used to denote sleep) this night, so that I may strike thee (*i.e.*, before I strike thee) then thou art divorced;" the man was not able that night to strike her, and the woman did not rest on her side but slept sitting: the man shall not commit a breach of his oath.

2259. (1359.) A man says to his wife, "If thou shalt comb (the hair of) anybody, then thou art divorced;" then comes another woman who has already combed her hair, and the wife ties the hair (without using the comb): the learned lawyers have said that the woman shall become divorced.

Moulana (Kazee Khan, the author of these Fatawa), on whom be peace, says, that in this answer there is a doubt; because what has taken place is not considered "combing."

2260. (1360.) A man says to his wife, "If so and so has entered this house to-day, then thou art divorced;" and he then says, "If so and so has not entered this house to-day, then my slave is free:" the man's wife shall become divorced, and his slave shall become free; because each oath is an admission by the swearer regarding (the facts which constitute) a breach of oath in the other oath: (that is, the first expression means, "so and so has not entered the house, if he has, then thou art divorced;" there is therefore, an admission that so and so has not entered the house, and that being so, his slave must be set free, according to the second oath,

which means, "so and so has entered the house, if he has not, then my slave is free;" this, therefore, is an admission that so and so has entered the house, and therefore, according to the first oath, his wife is divorced).

2261. (1361.) A woman takes up (and appropriates to herself) a (piece of) cloth out of her husband's cloths; her husband then says to her, "If thou shalt not return the cloth to-day, then thou art divorced;" the woman then goes away to produce the cloth to return it, and the husband follows her; the woman is just in the act of taking out the cloth from the bundle in order to return it to her husband, when the husband himself seizes the cloth out of the bundle or from her, before she could return it to her husband: the man shall not commit a breach of his oath, by analogy (or *Istihsan*) and such has been the view of Aboo Leith, on whom be peace.

2262. (1362.) A man claims a thousand dirhems from another; the defendant says, "My wife is divorced, if thou hast owing from me a thousand dirhems," and the plaintiff says, "If there is not for me against thee, a thousand dirhems, then my wife is divorced;" the plaintiff establishes proof by witnesses in support of his right, and the Kazee makes a decree in favor of that right (that is, in favor of the plaintiff): separation shall be caused between the defendant and his wife; and this is the view of Aboo Yusoof, on whom be peace, and it constitutes one of two traditions from Mahomed, on whom be peace, and the Fatwa is given accordingly. Then if the defendant after all this (*i.e.*, after the Kazee has made a decree) establishes proof by witnesses, to the effect that he, the defendant, did pay to the plaintiff the thousand dirhems, the defendant's claim shall be accepted, and the separation effected by the Kazee, between the defendant and his wife, shall become void, and the plaintiff's wife shall become divorced, if the plaintiff alleges that he has nothing owing from the defendant except the thousand dirhems claimed (*i.e.*, if the claim is laid with such precision that it is impossible to escape the conclusion that either the claim or defendant's proof must be false).

And if the plaintiff establishes proof by witnesses of the admission of the defendant, regarding the thousand dirhems (instead of bringing witnesses in "support of his right:") the learned lawyers have said that the Kazee shall not effect a separation between the defendant and his wife (although the Kazee shall decree that the debt is proved).

Moulana (Kazee Khan, the author of these Fatawa), on whom be peace, says, that this (last) rule is difficult to comprehend (and of doubtful authority); because what is proved by witnesses (*byyuna*), is similar to what is proved by seeing (in point of certainty); and if two witnesses have seen witnessed the admission of the defendant against himself as regards the thousand dirhems in favor of the plaintiff, the Kazee shall cause separation between the defendant and his wife.

2263. (1363.) A woman knows (that is, comes to know with certainty) that her husband has divorced her thrice; the husband denies having divorced her; and the woman has not the ability to prevent the husband from (having access to) her person: it is permissible to the woman to kill the husband; because she is helpless in preventing mischief to her person; and, therefore, it shall be allowable to her to kill him; but it is proper that she should kill him with drugs, and not with an instrument of death; because if the woman should kill him with an instrument which inflicts wound, she shall be put to death by way of *kisas* (or retaliation).

2264. (1364.) A man says to his wife, "If thou shalt do so and so, then my wives shall be divorced;" the woman does the act (which was forbidden): the divorce shall be caused on her and on the other wives; because what (divorce) is made dependent on a condition is, in the event of the condition being realised, like the one instantaneously (*Moorsil*) pronounced; the husband, therefore, must be taken to say, after the condition has been realised, "My wives are divorced." (The question is, whether the wife addressed is to be taken as excluded or not from the expression "wives.")

2265. (1365.) A man says to his wife, "* * * * * * * * * * * * * * then thou art divorced;" and the woman says, "* * * * * * * * * then my slave girl is free." Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says, that if both are standing at the time of the discussion, then the woman shall have satisfied her oath (that is, shall not commit a breach of her oath) and the husband shall commit a breach of his oath: and if both the man and the woman are sitting (at the time of the discussion) the husband's oath shall be satisfied, and the woman shall commit a breach of her oath; * * * * * * * * * * * * *

And if the man is standing and the woman is sitting, then the lawyer Aboo Jaffer, on whom be peace, says, that I do not know (what to say in) this, but that it is fit that both should commit a breach of the oath; because the condition of the fulfilment of each of the oath is that the * * * * * * * should be better; and when they are not uniform in their posture * * * * * * * no one is better, and, therefore, each of them shall commit a breach of oath.

2266. (1366.) A drunken man says to his wife, "If so and so is not * * * * * then thou art divorced." Aboo Baker Iskaf, on whom be peace, says, that this is a thing which cannot be known, and is beyond (human) power: the man, therefore, shall not commit a breach of his oath.

2267. (1367.) Two men say to each other, "If my head is not heavier than thine, then my wife is divorced:" the learned lawyers have said that the way to discover this (that is, whose head is heavier) is that when they both go to sleep, they should be called out, and whichever of the two answers earlier (his head shall be considered lighter, and) the other's head is heavier.

2268. (1368.) A man swears that so and so is heavy, but people think that man to be light, and the swearer thinks him to be heavy: the man shall not commit a breach of his oath unless he intends what the people think, because (unless he so intends) his oath is referable to what he (himself) thinks.

2269. (1369.) A man threatens another in the name of the Sultan (saying for instance, "If you do such and such a thing, the Sultan will punish you;") the man threatened, says, "If I am afraid of the Sultan, then my wife is divorced:" the learned lawyers have said that if the man (who thus expressed himself) had not, at the time he swore, fear of the Sultan, and if he has no cause to fear the Sultan, for any transgression which would make him apprehensive of his person, it is hoped that his wife shall not be divorced.

2270. (1370.) A man quarrels with his brother and sister, and he says to them in Persian, "If I do not put you into the bottom * * * then my wife is divorced:" the learned lawyers have discussed this matter; some of them have said that the man shall not violate his oath as long as they are alive (because as long as they live, it is possible that the condition might be realized); whilst others have said that the man shall

immediately commit a breach of his oath, because he is helpless in fulfilling his oath apparently, unless he intends to express severity and oppressive measures, and then he shall not commit a breach of his oath as long as they are in the land of the living (and as long as he does not use severity and oppression). And if the swearer dies (that is, he is at the point of death, and no chance remains of his exercising acts of oppression and severity), or if one of the other two dies before the man has acted so (*i.e.*, with severity and oppression), the man shall commit a breach of his oath; and this view is well-founded.

2271. (1371.) A woman says to her husband, "Oh thou mean (*Sifla,*)" or says, "Oh thou Kurtban" or "Kushkhan," or "Oh thou Suffal," or uses any other term of abuse; the husband then says, "If I am like what thou hast said, then thou art divorced thrice:" the learned lawyers have differed in this matter: the lawyers Aboo Jaffer and Aboo Baker Iskaf, on whom be peace, say, that the woman shall be divorced as soon as the husband has so expressed himself, whether the husband is or is not as the wife has described him (by her abusive epithets); and the Futwa is given according to this view; because what the husband has said apparently refers to retaliation on his part, by way of resentment, against the manner in which the wife has addressed her husband (so that the condition is no condition at all but is a form used for the purpose of causing instantaneous divorce); and if the husband says, "I (really) intended thereby making the divorce dependent (or conditional)," then Aboo Baker Iskaf, on whom be peace, says, that the husband shall be believed morally as between him and his God, but that he shall not be believed by the Kazee; because apparently his words are referable to resentment.

And Shaikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says, that if the husband has expressed himself as aforesaid in a state of anger, then the same shall be referred to resentment, and then the husband shall not be believed by the Kazee, when he says his intention was to make the divorce conditional; but if he has not so expressed himself in a state of anger, then his intention shall have effect given to it; and if he says, "I intended by the expression to make the divorce conditional," then if the husband is really as the wife has described him, the divorce shall be caused, and not otherwise.

2272. (1372.) And the learned lawyers have differed regarding the meaning of these expressions (that is, those used by the wife in the previous paragraph). As to the "Sifla," it is reported from Aboo Huneefa, on whom

be peace, that a Moslem cannot be a Sifla, but that only an infidel can be a Sifla: and the Mashaikhs, on whom be peace, have adopted the same view: and it is reported from Aboo Yusoof, on whom be peace, that a Sifla is one who does not take notice of (or care for) any vile and abusive epithet directed to him: and it is reported from Mahomed, on whom be peace, that a Sifla is one, who bets on pigeons and is given to gambling: and Khuluf, son of Ayoob, on whom be peace, says, a Sifla is one who, when invited to a feast, takes away with him some portion of what is on the table cloth; and some have said that he is (*toofailce* or) one who goes uninvited to a feast in company with one who is invited: and others have said that a Sifla is a weaver, or barber, or tanner of hide; and others have said that he is one who frequents the Kazee's Court (to give false evidence or make proposals of bribery).

As regards the "Kurtban," Aboo Baker, Iskaf, on whom be peace, says, that he is one who, when he sees a stranger with his wife or his family or his near female relatives, who are unlawful to him (*Maharim*) leaves the stranger there, and makes no objection: and Abool Kassim Saffar, on whom be peace, says, that the Kurtban is one who is (a go-between or) an instrument for the purpose of bringing together a strange man and a strange woman for a blamable object: and some have said that he is one who sends his wife with his male adult slave or with his laborer, towards the land the subject of cultivation (*Zyut*), or has given them permission to enter into his wife's presence during his absence.

As regards the "Suffal," he and the Kurtban are alike.

But as regards the "Kushkhan" (the following anecdote shews who he is), it is reported that a woman came to Aboo Ismut of Merv and said, "My husband is in the habit of ordering me every day to cook, and I said to him one day, 'Oh Kushkhan! how long am I to go on cooking;' he then said to me 'If I am a Kushkhan, then thou art divorced':" then Aboo Ismut, on whom be peace, said,—"If thy husband is such that when he hears that somebody has stretched out his arms towards thee with evil design and does not resent it, then he is a Kushkhan; but if he does not permit this (liberty) and thrashes thee for it, then he is not a Kushkhan."

But as regards the "Majin," Shumsh-ool Ayma Hulwai, on whom be peace, has said that he is one who does not care for what he hears (said of him by way of abuse or correction, &c.), and he is called in Persian *Teb Sheb*.

2273. (1373.) A woman says to her husband, "Verily thou art a Kurtban;" and the husband then says, "If thou knowest that I am a Kurtban, then thou art divorced thrice:" the woman shall not be divorced until she says, "I do know;" because the husband has made the divorce dependent on her knowledge, and her knowledge cannot be known to anybody else, and the divorce, therefore, shall depend on information by her.

2274. (1374.) And if the wife says to her husband, "Oh thou Kousuj!" and the husband says, "If I am a Kousuj, then thou art divorced thrice," intending thereby to make the divorce conditional (instead of causing it instantaneously; see paragraph 1371): it is reported from Aboo Huneefa, on whom be peace, that he said that the husband's teeth shall be counted, and if his teeth are eight and twenty, the woman shall become divorced, because he is a Kousuj; but if his teeth are thirty in number or more, then he is not a Kousuj; (therefore, according to this view, a Kousuj is one having less than thirty teeth).

And in our idiom, a Kousuj is one the hair of whose beard are on his chin and not on his two cheeks; or the hair are his chin and also on his two cheeks, but they are scattered in different portions and have not grown together; but if the hair of the two cheeks are joined to the hair of the chin, then the man is one having a sparse beard, but he is not a Kousuj.

2275. (1375.) A woman says to her child in Persian, "Oh thou born of adultery (*balaya zada*;)" and her husband says, "If he is born of adultery, then thou art divorced thrice;" if the husband intends resentment (and instantaneous divorce), then the woman shall become divorced (immediately); but if he intends to make the divorce conditional, then, if the woman knows that the child was born of adultery, she shall be divorced thrice in consequence of the condition of the divorce being fulfilled; and it is not proper for the woman to live with him; but if she knows that the child was not born of adultery, then she shall not be divorced. (See paragraph 1330).

2276. (1376.) A man says to his wife, "If thou shalt abuse my mother or name her with disrespect, then thou art divorced;" he then says to his wife, "Thy mother—greeting to thee" (that is, bravo, or *wah wah*, take my *salaam*, thy mother was of such a character) the wife says, "No, on the contrary, *thy* mother;" (that is *salaam* to thee on account of thy mother's character): the learned lawyers have said that if this,

takes place in a town where this expression is considered equivalent to an expression of disrespect, as for example Balkh and other places, then his wife shall become divorced; because according to the idiom of the people of that place, this expression means or implies a quarrelsome woman (or one who always contradicts another). But according to our idiom, the expression means to send greeting, and this shall not, therefore, amount to naming anybody with disrespect, and the wife shall not therefore be divorced.

2277. (1377.) A man says, "If I abuse any one, then my wife is divorced;" he then abuses a human corpse: his wife shall become divorced.

2278. (1378.) When a man says to his wife, "When thou shalt abuse me then thou art divorced, and if thou shalt curse me, then thou art divorced;" the woman then curses him: one divorce shall be caused on her.

And if the husband says to her, "If thou shalt abuse me (without saying if thou shalt curse me) then thou art divorced;" and the woman curses him, his wife shall become divorced (because abuse includes curse).

2279. (1379.) A man says to his mother in Persian, "If thou shalt leave (or part company with) me to-day, then my wife shall be divorced;" then the man is (preparing for) going, out of his house; his mother then says, "Now you may remain, now your wife may remain with you," (that is, the mother says to the son and his wife, why are you going away, I am myself going away); the swearer hears of this: his wife shall become divorced.

2280. (1380.) A man says to his wife, "If I shall put you out of temper, then you are divorced;" he then strikes a child of her and she loses her temper: the learned lawyers have said that if he has struck the child on account of something so that it is proper to correct him for the sake of discipline, then his wife shall not be divorced; because this is not an occasion for the woman to take offence and lose her temper; and her display of temper shall therefore not at all be heeded; but if the man has struck the child on an occasion which does not require the correction of the child for the sake of the discipline of the child, then his wife shall become divorced.

2281. (1381.) When the husband says to his wife, "If I shall please thee, then thou art divorced;" he then strikes her, and the woman says (ironically) "thou hast pleased me:" the learned lawyers have said

that his wife shall not become divorced; because we are quite certain of her falsehood.

Moulana (Kazee Khan, the author of these Fatawa), on whom be peace, says, that there is doubt as regards the correctness of this answer, and the doubt arises from the fact that pleasure is a thing which nobody can know (except the person concerned), and it is, therefore, fit that the divorce should be dependent on information given by her, and that her word should be accepted in that matter, although we might be certain of her falsehood, just as if a man says to his wife, "If thou art pleased that God the Almighty should make thee suffer the tortures of hell, then thou art divorced," and the woman says, "I am pleased," the divorce shall be caused on her (as admitted by all lawyers, although we might be certain that the woman has uttered a falsehood). And if the husband gives her a thousand dirhems, and the woman says, "The thousand dirhems have not pleased me," the word to be accepted shall be her word, and the divorce shall not be caused on account of the possibility that she having asked for two thousand, she was not pleased with a thousand (and if she asked for five hundred and got a thousand, and says I am not pleased, her word is still to be accepted).

2282. (1382.) And if the husband says to his wife, "If I shall cause thee pain then thou art divorced;" the husband then purchases a female slave and makes *Soorryya* of her * * * * *Soorryya* being derived from *Sirr* which means concealment); then if his expression is founded on (or is preceded by) something by way of introduction, so that the meaning of pain could be referred to that thing instead of being referred to what he has done (that is to say, if the circumstances are such that the pain mentioned in the husband's expression can reasonably be referred to something besides the purchase of the slave subsequently made by him), his wife shall not be divorced; because the oath relates to that particular introductory matter: but if such is not the case, the woman shall become divorced; because this act of the husband's (*viz.*, the purchase of a female slave by him for the particular purpose) in effect is deemed (or included in) "pain."

2283. (1383.) A man intends to purchase a female slave, and he says to his wife, "If I shall purchase a female slave and then jealousy shall overtake thee by reason of my purchase, then thou art divorced thrice;" he then purchases a female slave, and jealousy does come upon her: the learned lawyers have said that if the jealousy immediately fol-

lows the purchase, the divorce shall be caused (because the word "then" in the expression, "and then jealously, &c.," requires jealousy to follow immediately); but if jealousy comes upon her sometime after the purchase, then the woman shall not be divorced; because the husband has made the divorce conditional on the jealousy following immediately after the purchase without any interval of time; and this matter (that is, whether the woman feels jealous or not) is known only by the woman's words when she is fretting about and using abusive epithets (*i.e.*, goes about swearing and cursing). But if the woman feels jealous (in her mind) but does not shew the same in her words, she shall not be divorced; because what is in her mind cannot possibly be avoided, and no regard shall, therefore, be paid to it, just as if somebody swears that he will bear no enmity to so and so, but he does in his heart feel enmity towards him, but keeps his tongue and also his acts (Juwarih—hands and feet) under control, he shall not commit a breach of his oath.

2284. (1384.) A man says to his wife, "Thou dost not love me;" the woman says, "If I do not love thee, then thou art divorced thrice;" the husband says to her in Persian, "Thou thyself art (so divorced if thou dost not love me);" the woman says, "I do not love thee:" if she says, "I do not love thee" before separating from the meeting, she shall become thrice divorced; but if she parts (or separates) from the man, before saying anything, she shall not become divorced, because his expression, "Thou thyself art" relates to the woman's expression making the husband conditionally divorced, and, therefore, the husband in effect says, "(Not I) but on the other hand thou art divorced thrice, if thou dost not love me."

2285. (1385.) A man asks his wife to come to his bed * * * * * * * * ; the woman says, "What shalt thou do with me, and such and such a woman is sufficient for thee," referring to a strange woman; the husband then says, "If I love such and such a woman then thou art divorced:" the learned lawyers have discussed this matter, and the correct rule is, that the woman shall not be divorced until the husband says, "I love her."

2286. (1386.) A man says to his wife, "If thou art not with me (*i.e.*, in my estimation) lighter (or more contemptible) than dust, then thou art divorced;" if the husband regards her very low so that people say that she is less than dust to him, the woman is not divorced.

2287. (1387). A man says to his wife, "If I accuse thee of adultery, then thou art divorced;" he then calls her, "Oh daughter of an adultress:" the woman shall become divorced; because, according to ordinary parlance, this is considered as accusing the woman of adultery, although, in reality, it is accusing the mother of adultery.

2288. (1388). A man says to his wife, "If I abuse thee, then thou art divorced;" he then says to her "May God not prosper thee:" she shall not be divorced; because, if he had made manumission dependent on abusing the slave, and then says to the slave, "May God not prosper thee," his slave shall not become free; so also in the matter of divorce.

2289. (1389.) A man prepares a feast for a party, and a man from another village (not belonging to the party) arrives; the host says, "If I do not slaughter one of my cows out of respect to the comer (he who has come uninvited), this my wife is divorced;" he then slaughters one of his cows before the man goes back: his oath shall be satisfied (and divorce shall not be caused); but if he does not slaughter before he goes back, then he shall commit a breach of his oath: and if he slaughters a cow belonging to his wife, he shall commit a breach of his oath; because the condition for the fulfilment of the oath was to slaughter a cow out of his cows, unless there is, between him and his wife, such unity (or amity) that each does not distinguish his or her property from that of the other, and that if one of them appropriates the property of the other, then no disagreement takes place between them.

And if he slaughters one of his cows but does not feast him with the meat of the cow, so that the comer goes away, then the learned lawyers have said that if the village to which he goes is very near, the man does not commit a breach of his oath; but if the village is so distant that it can come under the denomination of journey, it is feared that the man shall commit a breach of his oath; because in a case where a man comes from a journey, people prepare a feast for him by making a slaughter; and the man's oath shall, in that case, relate to the feast.

2290. (1390.) A woman says to her husband, "Verily dost thou absent thyself (on journey, &c.), and not leave maintenance for me;" the husband becomes angry; the woman says, "What I said was not a hard expression so as to necessitate anger that thou shouldest be angry;" the husband says, "If this is not a hard expression then thou art divorced thrice," intending thereby to make divorce conditional, and not mere

resentment (that is to say, not intending to cause immediate divorce): the learned lawyers have said that if the man is a respectable person, having a position, so that imputation like this is an insult to him, the woman shall not become divorced; because her complaint that the man goes away without providing for maintenance for his family, is something hard (and serious); but if the man is not a respectable person having a position, then the woman shall become divorced.

2291. (1391.) A man says, "If my son attains the age of circumcision, and I do not cause his circumcision, then my wife is divorced:" the lawyer Aboo Leith, on whom be peace, says that, if he delays the circumcision beyond ten years, it is fit that the man should commit a breach of his oath; because ten years is the extreme age of circumcision; because if the child reaches ten years of age, he shall be chastised for omission to observe prayers, and, therefore, his circumcision shall be directed, so that the extreme degree in purification might be attained: and the Mashaikhs other than Aboo Leith have laid down, that the man shall not commit a breach of his oath until he delays the circumcision beyond twelve years of age; and the Fatwa is given according to this view, because this is the lowest period when a boy can be said to attain his majority (*booloogh*); because when the boy attains this age (of 12 years) and says, "I have had * * ," his word shall be accepted, and he shall be decreed to have attained majority; and before this age, if the boy says, "I have had * * ," his word shall not be accepted, and he shall not be held to have attained his majority.

2292. (1392.) A man says to his male slave, "If thou * * then thou art free;" the boy then says, "I have * * * " and his is a doubtful case (it being doubtful whether he is twelve years of age or not, so that it cannot be said whether his statement as regards his puberty is true or not): his word shall be accepted, because * * by him is a thing which cannot be known to another person besides himself, and, therefore, his word shall be accepted in this matter; just as if a man says to his female slave, she being in a doubtful state (as regard the question of her age, and whether she has attained puberty or not), "When thou shall get menses, then thou art free," or says to his wife, "When thou shalt get menses, then thou art divorced," and she says, "I have got menses" her word shall be accepted: and it is reported from Mahomed, on whom be peace, that the word of the boy shall not be accepted, and that the word of the slave girl shall be

accepted; because * is a thing which another can know to a certain extent, and for this reason deposition of witnesses in the matter of * is permissible, contrary to the case of menses (which nobody else can know).

2293. (1393.) A man says to his wife, who is in her menses, "When thou shalt have menses, then thou art divorced," this relates to future menses; but if he says, "When thou shalt have menses to-morrow, then thou art divorced," he knowing that she is in her menses, then this oath relates to the continuance of the same menses till the morrow; so that if the menses continue until the dawn of the morrow, she shall become divorced, because future menses cannot supervene on the morrow (she being at present in her menses) and, therefore, the oath shall relate to the continuance of the (present) menses if the husband knows of the present menses.

And so also if the husband says to his sick wife, "If thou shalt get sick then thou art divorced," this oath relates to a future sickness (after recovery from the one she is suffering from at present); but if he says, "If thou shalt be sick to-morrow," then this oath relates to the continuance of the same (present) sickness apparently.

And if the man says to his wife who is in health, "When thou shalt be in health, then thou art divorced," then the divorce shall be caused as soon as he pauses after his oath; because health is a thing which is prolonged (in point of time, as contradistinguished from a thing which is *Aany* or evanescent); and in regard to a thing like it, every moment can be said to be its commencement, and, therefore, the man shall commit a breach of his cath at once; just as if a man says to one who is standing, "When thou shalt stand" and to one who is sitting, "When thou shalt sit" and to one who has eye-sight, "When thou shalt see" and to his slave girl, "When I shall be thy owner," "Then thou art free;" verily he shall commit a breach of his oath, as soon as he pauses after his oath; because a thing which is always continuing is deemed to commence with every moment of time.

And although menses and sickness also belong to things which are prolonged, but when law (*Shera*) makes rules (*Ahkam*) dependent on the entirety of the same, then the rules (*Ahkam*) shall not relate to every one of the various parts, and, therefore, the whole of them shall be considered as one (indivisible) thing.

2294. (1394.) A man says to his wife (in Persian), "If I shall clothe thee with what is produced by me then thou art divorced;" the woman then gives thread belonging to her to her husband in order that he might weave it (into cloth) for her, for known wages, and pays him the wages, and the husband weaves the same, and the woman clothes herself with it: the husband shall not commit a breach of his oath; because the cloth is the earning of the wife and not that of the husband, and because the condition is "To clothe" and he does not clothe her, and she does not clothe herself by his order, and, therefore, he shall not commit a breach of his oath; and if the cotton belongs to the husband, then also the husband shall not commit a breach of his oath, on account of the second explanation given (that he does not clothe her, &c.).

2295. (1395.) When a man says to his wife, "Thou art divorced, in thy fast;" and the woman makes (or forms) intention (in the night) to keep the fast (in the morning), she shall become divorced when the morning shall dawn; and if he says, "Thou art divorced in thy prayer," she shall not become divorced until she goes into her *Rookoo* and *Sijda*; because the man has made fast and prayer conditions of divorce, and therefore his oath is the same as if he had mentioned the conditional preposition "If" (*i.e.*, thou art divorced, if thou fast or pray). And if he says, "Thou art divorced for thy entry in the house" or says "for thy menses" (meaning because entry or menses have been found,) she shall become divorced at once; and if he says, "Thou art divorced, with thy entry (in the house)" or "with thy menses" (*i.e.*, "If thou enter or if thou get menses") she shall not become divorced until she enters the house or gets her menses. So also if he says, "In thy entry in the house" or "In thy menses," she shall not become divorced until she enters the house or gets menses.

2296. (1396.) A woman goes to the house of her father in a different village; her husband follows her, and asks her to return to his house, and the woman refuses to do so; the husband then takes oath by her divorce if she does not go to his house this very night; the woman then goes with her husband, who takes her to his house before the morning dawns: the learned lawyers have said, that if the man has been for the greater part of the night in the village of the wife's father, it is feared that he shall commit a breach of his oath; but if he goes away before the expiry of the greater portion of the night, it is hoped that he shall not commit a breach of his oath: and the correct

rule is, that the man shall not commit a breach of his oath, when his wife goes away with her husband, before the expiry of the night (that is, if the woman reaches the husband's house before morning).

2297. (1397.) A woman is living with her husband in her father's house; her husband says to her, "Come thou with me;" she refuses; the husband then says, "If thou shalt not go with me, then thou art divorced thrice;" and the husband goes out of the house, and the woman also goes out (*i.e.*, after him) in his footsteps, and she reaches the husband's house before the husband: the learned lawyers have said that if the woman goes out so that her going out cannot be called going along with him, then the husband shall commit a breach of his oath.

2298. (1398.) A man says to his wife, "If thou dost not get up at once and come to my mother's house, then thou art divorced;" the woman then gets up immediately before the husband could go out, and she dresses herself and goes out, she then returns and sits down until her husband goes out, and then she also goes out; and she comes to the house of her husband's mother after her husband arrives there: the husband shall not commit a breach of his oath; because when the woman got up and prepared herself to go out, the promptitude (involved in the husband's expression) was not neglected, because suppose she has to urinate and does so, and then dresses for the purpose of going out, the husband shall not commit a breach of his oath.

Dost thou not see if the husband says to the wife, "If thou dost not come to my bed * * * * at the present moment (at once), then thou art divorced;" and the husband and wife wrangle about the matter, so that the discussion is lengthened between them, the (*fowr* or) promptitude (involved in the expression *at the present moment or at once*) is not destroyed (in consequence of the dispute and discussion), so that if she goes to his bed (after the discussion), the man shall not commit a breach of his oath; and if the wife (thus invited by the husband to his bed) fears that (by complying with his wishes) she might lose (the time of) her prayers, and, therefore, says her prayers (and then goes to her husband's *Firash*), Nuseer, son of Yehea, on whom be peace, says, the husband shall commit a breach of his oath; because to say prayers is quite a different act (from making preparation to comply with the husband's directions); contrary to when both of them are discussing the matter (that is, the propriety of complying or not with the husband's

wishes); whilst other learned lawyers have said that the man shall not commit a breach of his oath (in the case of prayers).

2299. (1399.) A man intends * * * * * * but the wife does not obey him, the husband then says to her, "If thou dost not enter with me in this room, then thou art divorced;" the woman does not enter at once (or with promptitude) but enters afterwards: the learned lawyers have said that if she enters the room after * * * * * * she shall become divorced.

2300. (1400.) A man calls his female slave to his bed * * * * * * * ; she refuses; the man says, "If thou shalt not come (to my bed) this night, then thou art free;" the woman comes at once, but the man * * * * * * : the female shall not become free. So also if the man expresses himself thus to his wife.

So also if a man says to his male slave, "If thou dost not come near me this night, so that I may beat thee, (then thou art free;") and the slave does come to him (that night), but he does not beat the slave; the man shall commit a breach of his oath according to the view of Aboo Yusoof, on whom be peace, but Mahomed, on whom be peace, says, that the man shall not commit a breach of his oath; and the Fatwa is given according to this view.

And if a man says to his wife, "If thou dost not come to me * * * * * * * then thou art divorced;" the woman goes to him, * * * * * * : the husband shall not commit a breach of his oath.

2301. (1401.) A man says to a number of people (*Jamaut*) in Persian, "If all of you shall not go to my house as guests, then my wife is divorced;" they go to his house, but do not eat anything: the man shall not commit a breach of his oath.

2302. (1402.) A man says to his wife at the time she is going out of his house, "If thou shalt return to my house, then thou art divorced thrice;" the woman then (before going out) sits down, and does not go out for a while, and then goes out and comes back; the husband then says, "I had intended promptness" (that is, my intention was that if you were to go out at once you would be divorced: and inasmuch as you did not go out at once, there is no divorce): some of the learned lawyers have said that the man shall not be believed by the Kazee

(and divorce shall take place), whilst others have said that the man shall be believed by the Kazee; and this view is correct, because the man's oath relates to the going out which was in contemplation by the woman by her act of standing, without the necessity of any intention on the part of the husband (for such going out), and when he (also) intends promptitude, it is more fit that he should be believed.

2203. (1403.) A man says to his wife, "If thou shalt ascend (or get up to) this story (of the house), then thou art divorced;" the woman then ascends a few steps: the man shall not commit a breach of his oath; and this view is correct.

And if the husband says to his wife, "If thou shalt ascend this stair, or put thy foot on it, then thou art divorced;" and the woman then advances (and puts) one foot on the steps, and then she recollects the matter and turns back: she shall become divorced; because the breach of oath was realised by the foot being put on the steps.

2304. (1404.) And if the husband says, "If I put my foot in the house of so and so, then my wife is divorced;" the man then puts one of his two feet in the house of so and so, he shall not commit a breach of his oath, because to put one's foot in the house is an implication for entering the house according to idiom; and therefore the man shall not commit a breach of his oath unless he enters the house.

But as regards that case (*viz.*, the one in 1403), where the husband used the word "to ascend" and "to put foot on the steps," he verily used exaggeration (for the purpose of preventing ascent) in his oath (meaning if thou shalt ascend or even put thy foot on the steps) and therefore the breach of oath took place when the foot was put on the steps; and this is just as if a man says (to his wife), "If thou shalt go out of this house or put thy foot in the street, then thou art divorced," and the woman then puts her foot in the street, the husband shall commit a breach of his oath; and if the husband speaks of going out, but says nothing regarding the foot being put in the street, and the woman puts one of her two feet in the street, the husband shall not commit a breach of his oath.

2305. (1405.) A man says, "If God torments (*azab*) the infidels, then my wife is divorced:" the learned lawyers have said that his wife shall not become divorced; because there are some infidels whom God will not torment; and the man shall not, therefore, commit a breach of his oath.

2306. (1406.) A man says, "If I shall see (*Zyarut*) so and so, whether he be alive or dead, then my wife is divorced;" he then follows the funeral of that so and so: the learned lawyers have said that the man shall not commit breach of his oath; because following a funeral is not called seeing the man (deceased): and it is reported from Aboo Yusoof, on whom be peace, that the man shall commit a breach of his oath.

2307. (1407.) A man says "If I spend (*infak*) out of my wife's property, then she is divorced;" the woman then burns her cow-dung cake (*Sirkeen*), under the pot (*Kidr*) containing raw silk (or cocoon) belonging to her husband without his order: the man shall not commit a breach of his oath.

2308. (1408.) A man says, "If I shall make repairs in this house, then my wife is divorced;" then a wall between this house and a neighbour's house becomes dilapidated, and the man repairs it, and intends by such repairs the repair of the neighbour's house and not the repair of *this house*: the learned lawyers have said that the man shall commit a breach of his oath, and his intention (*Kusd*) shall be void.

2309. (1409.) A man says to his companions "If I do not take you this night to my house, then my wife is divorced;" he then takes them a portion of the way, and then thieves catch them (or fall upon) and imprison them: the learned lawyers have said that the man shall not commit a breach of his oath (because it is necessary that the possibility of birr or the fulfilment of the oath should continue the whole of the night).

And this answer agrees with the views of Aboo Huneefa and Mahomed, on whom be peace, (who hold that the possibility of carrying out the oath must remain in existence all through the night and not only, as Aboo Yusoof says, at the time the oath is taken).

And the principle of the rule is, that when a man swears that he will drink to-day of water which is in this jug (*kooza*), and he then throws away the water (so as to render it impossible for him to drink the same) before the day expires, he shall not commit a breach of his oath according to Aboo Huneefa and Mahomed (because the possibility of carrying out the oath was not continued the whole day; but if the man allows the water to remain in the jug the whole of that day, and does not drink of it, and throws away the water the next day, then he shall commit a breach of his oath).

2310. (1410.) A man says "If I ride, then my wife is divorced:" the oath shall relate to riding animals, such as the horse, the camel, the ass, the mule, and such like animals, and shall not relate to riding on the back of a human being or on the wall.

But if he says "I shall not ride on any thing on which one rides (*Murkub*)" and he rides on the back of a human being: some of the learned lawyers have said that the man shall commit a breach of his oath, whilst others have said that he shall not commit a breach of his oath, and this (latter) view is correct; because a human being is not called (*Murkub* or) a thing on which one rides.

2311. (1411.) A man says "If I speak falsely, then my wife is divorced;" he is then questioned regarding some matter, and he nods his head falsely: he shall not commit a breach of his oath until he speaks (or articulates).

2312. (1412.) A man says, "If I break wind (*Zurutto*) then my wife is divorced;" then wind escapes from him without his power to control: he shall not commit a breach of his oath, just as if he swears he will not enter the house of so and so, and he is made to enter under compulsion.

2313. (1413.) A man says "If I commit adultery, then my wife is divorced;" then two just men depose to an admission on his part ofhaving committed adultery (after the oath): his wife shall become divorced, but he shall not be subjected to the prescribed punishment (*Hudd*); but if two just men depose to their having seen him commit adultery, then he shall not commit a breach of his oath, and his wife shall not become divorced (because four witnesses are necessary); but if four men bear witness to the fact, and only two of them are just, even then his wife shall not become divorced.

2314. (1414.) A man says to his wife "If I separate from thee, then every woman with whose head I shall place mine on the pillow, is divorced;" he then separates from his wife, and marries another woman, and puts his head along with hers on the pillow: his (new) wife shall not become divorced; because (whilst taking his oath) he has not referred the divorce to ownership or to the cause of ownership (that is to say, if he had said, "Then every woman *whom I shall marry* shall be divorced," then his future wife would be divorced, the ownership or cause of ownership being indicated by the use of words of marriage; but if he has already another wife, and his oath refers to that wife, then the expression used would cover her case).

2315. (1415.) A man says to an old woman "Verily thou art my mother;" she says, "I am not thy mother;" then the husband says, "If I do not take pride on thy being my mother, then my wife is divorced:" the learned lawyers have said that the man shall not commit a breach of his oath, until he says with his tongue "I do not take pride".

2316. (1416.) A man says to his wife, who holds a cup containing water, "If thou shalt drink, then thou art divorced; and if thou shalt put it down, then thou art divorced, and if thou shalt throw it away, then thou art divorced:" the learned lawyers have said that (the device in this matter is that) the woman shall put a piece of cloth in the cup until it absorbs the water.

Moulana (Kazee Khan, the author of these Fatawa) on whom be peace, says, that there is no necessity for this ceremony (or trouble to find out a device); because if somebody else takes the cup away from her, or if she gives the cup to somebody else, the man shall not commit a breach of his oath.

2317. (1417.) A man says to his wife, "If I shall purchase a female slave, or marry (a woman) upon thee, then thou art divorced once;" the wife says, "I do not agree to one (divorce;") the husband then says to her, "then thou art divorced twice, if I do either of these things;" the woman says, "I do not agree to two (divorces);" he then says, "then thou art divorced thrice, if thou dost not agree to two (divorces)," without adding this time, "If I do either of these things:" Aboo Nusur, son of Sulam, on whom be peace, says, that the third expression is founded on what has preceded apparently (so that the three divorces are also conditional).

2318. (1418.) A man says to his wife, "If so and so divorces his wife, then thou art divorced thrice;" and that so and so disappears; and the swearer's wife establishes proof by witnesses that the absentee divorced his wife after her husband's oath: Aboo Nusur Duboosy, on whom be peace, says, that this proof by witnesses shall not be accepted, and this view is correct; because the proof by witnesses, whilst it relates to the condition regarding her right, is detrimental to the right of the absentee.

And this case is dissimilar from that where the husband makes his wife's divorce dependent on so and so's entry in a house, in which case, if the swearer's wife establishes proof by witnesses that the so and so did

enter the house, such proof by witnesses shall be accepted, and the Kazee shall decree the divorce of the woman present before the Kazee; because this proof by witnesses, whilst it relates to the condition on which her right depends, does not operate to the detriment of an absentee.

2319. (1419.) A man says to his wife, "Go thou to so and so, and get back from him such and such a thing, and bring it to me this instant, and if thou shalt not bring it, (this instant) then thou art divorced;" the woman goes, but is not successful in getting back the thing; but she gets it back from him the next day, and brings it to her husband: the learned lawyers have said that the man shall commit a breach of his oath, because his expression "bring it back to me this instant" is a clear (and direct) expression denoting promptness (*fowr*).

2320. (1420.) A man says to his wife, "If I * * * * * * * * * * then thou art divorced;" the slave girl then says that, "The man * * * * (after the oath) * * ;" but the master falsifies her: the word to be accepted shall be that of the master; and if the wife comes to know of the fact * * * * * * * * * * * it shall not be open (or allowable by law) to her to live with him or * * * * * * * * * * *.

But if the master says (in Persian), "If I have done so * * * * * * * * * * * * I have done right:" then this shall amount to an admission by him, and he shall commit a breach of his oath.

2321. (1421.) A drunken man strikes his wife; she goes out of his house; the husband then says, "If thou shalt not come back to me, then thou art divorced;" all this takes place in the afternoon, (during the time when Asur prayers are said): the woman comes back to her husband at night (during the time when Isha prayers are said): the learned lawyers have said that the man shall commit a breach of his oath; because his oath meant promptitude (*fowr*); and if the husband says, "I did not intend promptitude," he shall not be believed by the Kazee: And in a case where the wife stands up to go out (of the house), and the husband says, "If thou goest away, then thou art divorced;" and the woman then sits down, and then after having sat for a moment, she goes out, the man shall not commit a breach of his oath.

2322. (1422.) A man says, "If I have done so and so, then (he concludes in Persian), this woman, whom I have in house, divorce;" the fact is that he has done the act, but his wife is not in his house at the time of the oath: the man shall commit a breach of his oath; because his intention, by the use of the expression ("woman in house,") was to refer to his wife; but if he says, "This woman who is in this house, so and so (that is, divorce)" and if his wife is not in the house, which he has particularised, then his wife shall not be divorced; because when the house is fixed, then the expression does not mean his wife (*i.e.*, "house" may mean wife, but "this house" means the house).

2323. (1423.) An infant boy (minor and not sui juris) says, "If I drink wine, then, every woman, whom I shall marry, is divorced;" he does drink, he being an infant; he then marries after attaining majority, and his father-in-law thinks that the divorce has become operative; the boy who is major says, (in Persian), "Yes, she is unlawful to me:" the learned lawyers have said that this expression (emanating from the boy) is an admission by him of unlawfulness, and his wife shall become unlawful to him as a beginning (that is, now for the first time not by reason of his oath, which is inoperative, having been taken during infancy, but by reason of his admission); and others have said that his wife shall not become unlawful to him, and this view is correct; because, he made no admission of unlawfulness as a beginning, but he only made an admission regarding a cause (*viz.*, drinking of wine after the oath) on which both he and his father-in-law are agreed, and which as a cause of unlawfulness is void (the wine having been drunk in infancy, and the oath also having been taken in infancy. See Futawai Alumgiree, Vol. I, page 611).

2324. (1424.) A man says to his wife, "If thou shalt purchase water with bread, then thou art divorced;" the woman then purchases from the water-carrier (a vender of water) some water which he has brought from the plain (in exchange for bread): his wife shall become divorced; and if she gives bread to the water-carrier (water vender) and says, "Bring me water, for this bread," some of the learned lawyers have said, that the husband shall not commit a breach of his oath; because this is hiring (the water-carrier in lieu of wages) and not sale, (sale of a non-existent thing or of water before it is confined in the *mushuk* is not valid).

2325. (1425.) A woman is crying in her house; her husband says to his mother-in-law, "If thy daughter shall not go out of thy house, and

shall cry here, then she is divorced;" the wife then goes out of the house, and then comes back and cries: the lawyer Aboo Leith, on whom be peace, says, that if any person in the house hears her cry, she shall become divorced, when she cries; because the husband only prevented her from crying in order that her cry might not be heard; but if this is not the case, (*i.e.*, if nobody hears her cry after her return) then when she goes out without crying after the oath, the oath becomes void, and, therefore, the husband shall not commit a breach of his oath by her crying (inaudibly) after this, (that is, after going out and then coming back and crying inaudibly).

2326. (1426.) A woman says to her husband "If I shall bake bread so that thou mayest eat it, then my slave girl is free;" the woman then bakes bread for her neighbour, and the husband eats of it: the woman shall not commit a breach of her oath; because the meaning of her expression is, "If I shall bake bread for thy sake;" and when she does not bake bread for his sake (or use), she shall not commit a breach of her oath.

2327. (1427.) A man says to his wife, "If thou shalt enter the house of so and so without my meaning and wish, then thou art divorced;" the woman then intends to go to the house of so and so; the husband says (in Persian), "You may go, what comes to me" (that is, I will not be visited by the consequences which may fall on you): this is a threat and not permission, and if she enters the house, the man shall commit a breach of his oath.

2328. (1428.) A man says to one of his two wives, when she asks him to divorce her co-wife "Verily if I shall divorce her, then verily shalt thou be divorced;" (*i. e.*, if I shall divorce her I shall divorce thee also); the woman says "I agree to it;" he then divorces her co-wife, and then says to the woman, "Purify thy womb (an indirect expression for divorce;") he then denies (having divorced the woman): the learned lawyers have said that it is not lawful for the woman to live with the man; and if she intends to get back to him (as his wife) and if he has not already divorced her twice before this, the Kazee shall put him on his oath by God that he did not intend by the expression used by him (that is, purify thy womb), more than one divorce (because it is lawful in using such an expression to intend three divorces); and if the man refuses to take the oath, the woman shall not return to him (that is, he shall not be competent to marry her unless there is a Mohullil); and if he takes the

oath (thus shewing he intended only one divorce), then the woman shall return to him by a fresh marriage.

2329. (1429.) A woman is living with her husband in the house of a relative of hers; the husband says to her at night, "If thou shalt pass this night in this house, then what is lawful is unlawful on me;" the woman then goes out of the house at once, and passes the night in a village, where her husband joins her: the learned lawyers have said that if the husband's intention was that the woman should go away herself, he shall not commit a breach of his oath (but if his intention was that he should take her himself out of the house, he shall commit a breach of his oath); and the word to be believed in this matter is his word.

2330. (1430.) And it is laid down in the Jamai Sugheer (a work by Mahomed) that a man says to his wife in Persian, "If thou shalt remain in this house this night, then thou art so and so;" she then goes out with her husband at once, and passes the night with him in his house: the learned lawyers have said that if the husband means that she shall go with her goods and things (or belongings) he shall commit a breach of his oath, if the woman leaves her belongings in that place; but if he intends that she should go out herself personally without (having any intention regarding) anything else, then he shall not commit a breach of his oath; and if the woman is doubtful (as to her lord's intention) she shall put him on his oath (after having gone out of the house and when the doubt regarding the divorce arises), and if he takes oath, then his reckoning is with God.

And this matter (that is the doubt whether divorce has been caused or not) takes place when he fixes a time (for the woman's going out) saying "If, this day, thou shalt remain here" (in which case his meaning would be doubtful, he might mean that she shall go herself, and might also mean she shall take her things, the time being sufficient for her to take away all her things); but if he fixes a year's time, then (the doubt shall not arise and) this shall mean that she shall remove herself with her belongings; and if he fixes no time, and he has no intention (whether she should take her things or not) at the time of his oath, then his oath shall be taken to mean that the woman shall remove herself personally.

2331. (1431.) A man intends to go on a journey; his father-in-law makes him swear saying, "If thou shalt after this (that is, in this journey), absent thyself from thy wife and shalt not return to her in the beginning

of the (next) month, then thy wife is divorced;" the son-in-law says, in Persian, (yes)—"It is" without adding anything further; he then remains absent for more than a month: his wife shall become divorced; because the man answered his father-in-law's words; and the answer incorporates what is in the question, and, therefore, his wife shall become divorced.

2332. (1432.) A man reports the oath of another, and when he reaches the point where divorce is to be reported, it occurs to him to divorce his own wife: if he himself intends, at the time of the mention of the divorce (in the course of the narrative), to give divorce by making it effective at once (*Isteenaf*) upon his own wife, and if the expression (containing the mention of divorce which he was reporting) although joined without interruption (*Mous-ool*) to the conditional clause, is sufficient (otherwise by the construction of its sentence) to cause divorce (on the narrator's own wife), then divorce shall be caused on the narrator's wife; but if the narrator does not intend his wife's divorce, then his wife shall not be divorced, although the expression might be sufficient to cause divorce by the narrator; because when the expression containing mention of divorce is joined to the condition, it shall (in the absence of such intention) be referred to the narrative. (For instance, a person reporting another's speech, says, the man said to his wife, "If I shall enter the house, then my wife is divorced:" here the expression used is, "my wife," and this is sufficient, if the narrator attributes the idea to himself, to cause immediate divorce on his wife; but if he reports the speech by saying that the man said "his wife is divorced," then this expression is not sufficient to cause divorce upon the narrator's wife; if the expression is sufficient, in the sense thus shewn, then if the narrator intends to cause immediate divorce upon his wife, such divorce shall be caused; but if he has no such intention, then it shall not be caused, and it shall be taken as part of the narrative. Be it known that the divorce, which the narrator shall cause, shall be immediate divorce, and not a conditional one, and that the condition must remain of the nature it originally was, *viz.*, part of the narrative, otherwise there would be no narrative at all: if the expression relating to divorce is disjoined with the condition, as when the narrator reports the condition, and keeps quiet for an hour, and then says, "My wife is divorced," this shall be ascribed to the narrator himself, and as applying to his wife. See paragraph 1086).

2333. (1433.) A man has four wives, with all of whom he has had intercourse; he then says, "Every woman out of you four, with whom

I shall not have intercourse this night, the others are divorced;" he then has sexual intercourse with one woman, and the morning dawns; the woman, with whom he has had sexual intercourse shall be divorced thrice; because the man rendered absence of intercourse with one woman, as a condition for the divorce being caused on the rest of them, by the use of an expression which includes all the women in consequence of the general import of the word "Every;" and as regards the woman with whom he has intercourse, the condition of her divorce is found thrice and that condition is the absence of sexual intercourse with three women and this woman (with whom the man has intercourse) shall, therefore, be divorced thrice: but as regards the rest of the women, the condition regarding the divorce of each of them was found twice, such condition being the absence of sexual intercourse with the (two) others, and each shall therefore be divorced twice.

2334. (1434.). A man is asked, "Is there any woman (wife) for thee, besides this;" the man says, "Every woman who is for me (except this one) is divorced:" his wife shall not be divorced; contrary to the case where the wife says to her husband, "Verily dost thou wish to marry a woman upon me" and the husband says, "If I shall marry a woman, then she is divorced;" and the husband then divorces his first wife by a *bain* or complete divorce, and he then marries her (*viz.*, the woman who was his first wife) again: she shall be divorced a second time.

So also if the wife says to her husband, "Verily has thou married a woman upon me" and the husband says, "Every woman I have, is divorced:" the woman so addressed shall become divorced, except according to one tradition from Aboo Yusoof, on whom be peace.

And the difference between these (last two) cases, is, that the expression used by the husband (in the last two cases) is founded on the expression used by the wife, and therefore the word which found place in the wife's expression (*viz.*, the general word "woman") also finds a place in the expression used by the husband; and what has been mentioned in the wife's expression, in these two cases is the word, "woman" and this word (woman) includes every woman that there might be, and, therefore, the woman addressed will be included in the husband's expression; but in the first case, the expression used by the person who put the question, "Is there for thee a woman besides this" does not include this woman in any way (because she is excluded by the words, "besides this") and therefore the husband's answer shall (also) not include her.

2335. (1435.) A man says to his wife, "Thou art divorced to-morrow, when thou enterest the house:" the mention of the word, "to-morrow," is a surplusage (*Lugho*), and the divorce shall be connected with the entry in the house, so that if she enters the house at any time, she shall become divorced; but if the husband mentions the condition before (the effectual clause) and says, "If thou enterest the house, then thou art divorced to-morrow," then the divorce of the morrow shall be dependent on the entry in the house, (that is, if the entry takes place on the morrow, then the divorce shall take place); because the man constituted to-morrow's divorce as the effect of entry.

2336. (1436.) And if a man says to his wife, "If thou enterest the house, then thou art divorced and divorced and divorced if thou speakest to so and so:" the first and second divorces are connected with the entry, and the third divorce is connected with the second condition: so that if she enters the house she shall become divorced twice; and if she speaks to so and so, she shall become divorced once.

2337. (1437.) And if the husband says, "If thou enterest the house, then thou art divorced if thou speakest to so and so:" the divorce which is dependent on her speaking to the so and so, is the effect of the condition relating to entry in the house; so that if she speaks to the so and so, before the entry in the house, and then enters the house, no divorce shall be caused: (that is, the meaning of the oath is this that entry in the house shall cause divorce only if the woman after the entry speaks to so and so).

2338. (1438.) A man says to his wife, "Thou and whichever of my wives enters the house, is divorced:" the woman addressed shall become divorced at once; and if she enters the house, being still in her *Iddut*, she shall become divorced a second time, because the fact that the woman was indicated by a special term (thou) does not prevent her from being included in the general expression (whichever of my wives).

2339. (1439.) So also if the husband says, "Whichever of my wives enters this house, is divorced and so and so:" the so and so shall be divorced at once; and if she enters the house whilst she is in her *Iddut*, she shall become divorced a second time.

2340. (1440.) So also if the husband says, "Every woman whom I shall marry, is divorced; and so and so," meaning by the last words the wife he already has: the so and so shall become at once

divorced and marriage (of the husband with another wife) shall not be waited for, (in order that the present wife might become divorced); and if the man marries (the first wife who was so divorced) again after this, then this woman (his first wife) shall become divorced a second time.

2341. (1441.) And if a man says to his wife, "Thou art divorced and such and such a woman if I marry her:" his wife shall not be divorced until he marries the so and so, (because, "If I marry her," is a *Mooghyyur* or an expression which alters the immediate effect of the words, "Thou art divorced").

2342. (1442). And if the husband says to his wife, "Thou and such and such a woman are divorced if I marry her:" the divorce shall not be caused on either of them, until he marries the "such and such a woman."

2343. (1443.) And if he says, "Thou and such and such a woman are divorced, if the such and such a woman enters the house:" the divorce shall not be caused until the such and such a woman enters the house.

2344. (1444.) And if he says, (to one of his wives), "Every wife I have is divorced and thou art divorced:" this wife shall be twice divorced, and the other wives shall be divorced once each.

2345. (1445.) And if the husband says to his wife, "Thou and whichever of my wives enters the house, are divorced:" this woman (that is, the one addressed, shall be divorced as soon as the man pauses; and if she enters the house during her *Iddut*, she shall have another divorce.

2346. (1446.) And if a man says to his male slave, "Thou art free and whichever of my slaves enters the house:" the one addressed shall be free at once: and if the man says, "I intended this slave's freedom,, (likewise) to depend on his entry (in the house)," he shall not be believed by the Kazee.

2347. (1447.) A man says to his wife, "Every woman whom I marry, as long as thou livest, is divorced:" the wife addressed shall not be included in the oath. So also if he says, "Every woman whom I marry, as long as such and such a woman (likewise his wife), lives (is divorced)," the such and such a woman is not included in the oath.

2348. (1448.) And if the husband says to his wife, "Every woman whom I marry, bearing thy name, is divorced;" he then divorces this

woman and then marries her (the very woman whom he had divorced): she shall not become divorced, although he might have intended (to include) her at the time he took the oath; just as if he says, "Every woman whom I marry other than thee is divorced:" this woman shall not be included in the oath, although he might intend (to include her in the oath).

2349. (1449.) A man says to his wife, "If I marry upon thee (that is, bring thee a rival wife) as long as thou livest, then what God has made lawful to me, is unlawful;" he then says, "If I marry upon thee, then it is obligatory on me to divorce;" he then marries a woman upon her: one divorce shall be caused on each of them (by the force of the expression, what "God has made lawful to me is unlawful"), and another divorce shall also arise (by force of the expression, "then it is obligatory on me to divorce") which the husband is at liberty to apply to whichever of the two he likes; because the man's expression, "Then what God has made lawful is unlawful to me" has been rendered an oath, for the divorce of every woman who might be his wife; and the second expression is an oath for the divorce of one of his wives, without such a one being determined, (that is to say, it is an oath for the divorce of one of his wives without specifying the particular wife); and, therefore, when he marries a woman, both the oaths come into operation (*i. e.*, *inhilal* or open out) and, therefore, one divorce shall be caused on each of the two by virtue of the first oath, and by virtue of the second expression, according to the view taken by him who validates such an oath, another divorce shall be caused on one of them without such a one being determined; but the husband shall be at liberty to apply this divorce to whomsoever he likes.

Moulana (Kazee Khan, the author of these Futawa) on whom be peace, says, this (latter portion of the) answer is open to doubt; because the second expression is an oath for the divorce of one of the wives, without such a one being determined, and as soon as he marries a woman, one divorce shall be caused on each of them (by virtue of the first oath); and therefore the new wife shall become *bain* or completely separated without there being any *Iddut* for her (there having been no sexual intercourse with her); then how will the husband be entitled to apply the second divorce to her? (the divorce by virtue of the second oath shall, therefore, apply only to the first wife).

2350. (1450.) A man has four wives; he says, "Every wife I have is divorced, when I enter this house;" he then divorces one of them

specifically, by a *bain* or complete divorce; he then enters the house whilst she (*viz.*, the divorced wife) is in her *Iddut:* all of them shall become divorced (including the divorced wife, who shall thus have two divorces).

2351. (1451.) A man says, "Every wife I have is divorced," intending by this expression, (to refer to) the wife who is already married to him, and also the woman whom he may acquire (or marry) afterwards: the divorce shall not be caused on the wife whom he might marry in future (because ownership, that is actual marriage or cause of ownership, that is, the use of the words, "The woman whom I may marry" is wanting here at the time of the oath).

2352. (1452.) A man says, "Every woman whom I marry is divorced, if I speak to so and so;" he then speaks to the so and so, and then marries: the divorce shall not be caused on the wife (because the marriage should have preceded the speaking, in order that the divorce might be caused); but if he speaks first and then marries, and then again speaks, the wife whom he marries after he spoke first, shall become divorced: this is stated in the Koodoory.

2353. (1453.) And if he says, "Every woman whom I shall marry, is divorced, if I speak to so and so; he then marries and then speaks, (she shall become divorced); and he then marries another woman and then speaks, the second wife shall not become divorced (because the oath in the form used becomes exhausted after the condition is once satisfied).

2354. (1454.) And if a man says, "Every woman whom I marry shall be divorced, whenever I speak to so and so:" he then marries a woman and then speaks (to the so and so): she shall become divorced; and if he marries a second wife, and then speaks to the so and so (or speaks to the so and so without having married a second woman), the first married wife shall be divorced a second time on account of this (second) speaking, if she shall be in her *Iddut*, and the second wife shall not be divorced.

2355. (1455.) A man says to his wife, "If thou art not pregnant, then thou art divorced thrice;" she then gives birth to a child in two years time less by one day, from the time of the oath: the woman shall not be divorced according to the Kazee, (because two years being the period of gestation, it is clear that she was pregnant when the oath was taken).

And if she is delivered after more than two years, by one day (from the day of the oath), she shall become divorced.

And if she gets her menses after the oath, the husband should not have sexual intercourse with her on account of the possibility (because the blood might not, in reality, be on account of menses) that she might not be with child (a thing on which certainty, so far as the Kazee is concerned, can only be attained by the circumstance whether the delivery takes place less or more than two years after oath): so also if she does not get menses, it is not proper for the husband to have sexual intercourse with her, until she is delivered, (when it shall be known for certain whether she was pregnant or not at the time of the oath).

2356. (1456.) A man says to his wife, "If I say to thee, 'Thou art divorced,' then thou art divorced;" he then says, "Verily have I divorced thee" (that is, in other words, "Thou art divorced"), she shall become divorced twice (once, by his expression "I have divorced thee," and a second time as the effect of the condition), so far as the Kazee is concerned; and if he intends that the divorce is to be caused only by his expression, "Thou art divorced" (and that no second divorce is to be caused by the condition, and that his expression though in form a condition was not really so) he shall be confirmed morally as between him and his God, (because he might mean by the expression, "Then thou art divorced" an explanation of the result of his expression "If I say thou art divorced" and not giving a second conditional divorce, that is to say, it is possible to read the expression, which is supposed to contain the oath, not in the light of a condition, but merely as a statement of fact).

2357. (1457.) A man says to a strange woman, "If I divorce thee then my slave is free:" this oath is valid, and it will be tantamount to his having said, "If I shall marry thee and divorce thee, then my slave is free."

But if he says to her, "If I divorce thee, then thou art divorced thrice," this oath shall not be valid.

2358. (1458.) When a man says to his wife, who is married to him by an invalid (or *Fasid*) marriage, "If I divorce thee (then my slaveis free); then the oath relates to divorce (uttered) with the tongue (that is, the oath merely implies his giving utterance to words of divorce although the divorce shall not be caused on her by reason of the marriage being *Fasid*).

2359. (1459.) A man swears, "I shall positively divorce such and such a woman to-day thrice (saying if I do not do so, then my slave is free);" and such and such a woman is a stranger to him, or a woman whom he has already divorced thrice: his oath relates to his giving utterance to words of divorce with his tongue; and this is just as if he swears "I shall certainly marry such and such a woman this day" whilst she is the wife of another man, who has had intercourse with her; this (latter) oath shall relate to an invalid marriage (with that woman, which marriage shall have no effect except satisfying the man's oath, and shall simply consist of the use of the words of proposal and acceptance without such words creating the relationship).

2360. (1460.) A man says to his wife, "If thou enterest this house, if thou enterest this house, then thou art divorced," the husband referring to one and the same house; the woman then enters the house once; she shall become divorced by *Istihsan*.

So also if he says, "If I marry thee, if I marry thee, then thou art divorced;" he then marries her once, she shall become divorced (and it is not necessary, in order to make the condition operative, that he shall marry her once, and then divorce her, and then again marry her).

And if he says, "If I marry thee, then thou art divorced, if I marry thee" or says, "When thou enterest the house then thou art divorced when thou enterest this house:" the woman shall not be divorced, as long as she does not enter the house twice, and she shall not become divorced as long as he does not marry her twice (because the effect of the condition, "If I marry thee" is the expression, "thou art divorced if I marry thee," that is, the divorce which is dependent on a second marriage is the effect of the condition "If I marry thee;" if he marries her and divorces her and then again marries her, this second marriage will give rise to the divorce involved in the oath).

2361. (1461.) A man says to his wife, "Divorce whichever of my wives thou pleaseth:" it is not open to her to divorce herself according to the Zahir-i Rawayet; but it is reported from Aboo Yusoof, on whom be peace, that it is open to her to divorce herself.

So also if he says, "My wives, every one of them, is divorced, if thou wish," and the wife says, "I have wished:" the divorce shall be caused on her and on the others, according to the view of Aboo Yusoof, on whom be peace, (but according to Aboo Haneefa and Mahomed, the divorce shall not be caused on this wife).

2362. (1462.) And if a man says to his wife, "The authority (to give divorce) to my wives, is in thy hands:" the learned lawyers have said that it is not permissible to her to divorce herself; but it is reported from Aboo Yusoof, on whom be peace, that it is competent to her to divorce herself.

2363. (1463.) And if the husband says to his wife, "My wives, every one of them, are divorced, if thou shalt enter the house;" she does enter the house: she shall become divorced and the others also.

2364. (1464.) And if the husband says to her, "Whichever of my wives, thou wisheth her divorce, is divorced;" she wishes the divorce of every one of them: only one wife shall become divorced, (because "whichever" relates to only one); and if he says, "Whichever of my wives wishes her divorce, is divorced;" and every one of them wishes her own divorce: all of them shall become divorced.

2365. (1465.) A man says to his wife, "Thou art divorced to-morrow, if thou wisheth:" her wish must be found on the morrow (because when the condition comes to be realized, then the law implies, as it were by a fiction, that the husband has now, on the fulfilment of the condition, again given utterance to the same words of divorce, which he had pronounced before).

And if he says, "If thou wisheth, then thou art divorced to-morrow:" she must wish that very day (and the divorce shall follow her wish and the word morrow shall go for nothing) according to the view of Mahomed on whom be peace; but Aboo Yusoof, on whom be peace, says, that her wish must be found on the morrow in both cases (whether the condition is stated after or before in the sentence), and this is in accordance with one of the traditions from Aboo Haneefa, on whom be peace.

And Zoofur, on whom be peace, says, that the wish must be found at present in both cases (and the divorce must follow the wish and the word "morrow" shall be surplusage), and such is the view of Aboo Haneefa, on whom be peace.

2366. (1466.) When a man says to his wife, "Adopt (separation) to-morrow, if thou pleaseth," or "Thy power (to divorce thyself) is in thy hands to-morrow, if thou pleaseth," or says, "If thou pleaseth adopt (separation) to-morrow," or says, "If thou pleaseth, then thy power (to divorce thyself) is in thy hands to-morrow:" her pleasure must be found on the morrow.

2367. (1467.) So also if he says, "If thou pleaseth, divorce thyself to-morrow:" it is not competent to her to divorce herself until the morrow arrives.

2368. (1468.) So also if the husband says, "Thou art divorced when thou shalt enter the house; if thou pleaseth." Aboo Yusoof, on whom be peace says—and this is the view taken by Aboo Haneefa, on whom be peace—that the wish (of the woman for her divorce) must be found after the entry (the expression means, "On your entering the house, you are divorced if you wish;" she must first enter the house and then wish for a divorce).

2369. (1469.) And if the husband says to his wife, "Thou art divorced in the beginning of the month, if thou pleaseth:" she must wish at the beginning of the month. (See paragraph 1465).

2370. (1470.) A man says to his wife, "Thou art divorced thrice, if thou pleaseth;" she then says, "I am divorced:" this is void (because her pleasure should be to take three divorces or not at all): but if she says, "I am divorced thrice," then she shall become thrice divorced.

2371. (1471.) A man says to his wife, "Divorce thyself ten times, if thou pleaseth;" she then says, "I have divorced myself thrice:" no divorce shall be caused.

And if he says, "Divorce thyself once, if thou pleaseth;" and she says, "Verily do I wish three:" no divorce shall be caused according to Aboo Haneefa, on whom be peace, (because the condition was not fulfilled expressly); but Aboo Yusoof, on whom be peace, says, that one divorce shall be caused (because three includes one).

2372. (1472.) And if the husband says to his wife, "Divorce thyself if thou pleaseth, and divorce such and such a woman if thou pleaseth," referring to his other wife; the woman says, "Such and such a woman is divorced and I am divorced," or says, "I am divorced and such and such a woman is divorced:" both the women shall become divorced: it has been so held by Mahomed, on whom be peace.

2373. (1473.) So also if the husband says to his wife, "Thou art divorced once if thou pleaseth and thou art divorced thrice if thou pleaseth;" the woman says, "Verily have I wished for once, verily have I wished for two:" then if she utters both the sentences together (without any break between them), she shall be thrice divorced.

2374. (1474.) So also if the husband says, "Divorce thyself if thou pleaseth and emancipate my slave if thou pleaseth;" she then commences with her own divorce or with the emancipation of the slave: either course is permissible.

It is said (by Mahomed) that when the power to divorce and to emancipate has been given on behalf of (one and the same person) the husband, both the matters shall be considered as one (act), so that she shall not lose the power to exercise the authority in respect of the other act if she commences with one act; (whereas if they had not been regarded as one act, and if the authority had been given for the two acts by two different individuals, and if she had exercised her authority with reference to one act, then she would lose her authority with reference to the other act; because when an authority is made dependent on her pleasure by the use of the words "when" or "if," and not by the word "whenever," then the wife must show her pleasure and must exercise the authority in the same *mujlis* in which the authority has been given without changing the *mujlis* by engaging herself in doing anything else; and, therefore, in case two persons separately give her authority, if she selects divorce to commence with, the *mujlis* changes as soon as the matter of divorce is over, and, therefore, the exercise of authority for the manumission would not be in the same *mujlis* in which such authority has been given; if only one act is done, the *mujlis* is the same; if two acts are done, the *mujlis* changes: when the same person authorises two acts, they both constitute one act for the sake of the unity of the *mujlis*. When the husband authorizes his wife to divorce herself this amounts to *Tufweez*, or the vesting the wife with authority to divorce, which the husband had. It does not amount to making her his Vakeel for the purpose; because the wife could not be both the vakeel and the principal. *Tufweez* involves *Tumleek*; and in Tumleek acceptance on the part of the donee in the same *mujlis* is necessary; therefore in Tufweez it is necessary that the wife should exercise the authority of divorcing herself at the same *mujlis*. This is the case when the Tufweez is in general terms, that is to say, when the husband simply says,—"Divorce thyself," in which case the wife must divorce herself at the same *mujlis*, so also if he says, "Divorce thyself *if* or *when* thou pleaseth." But if he says,—"Divorce thyself whenever thou pleaseth," then it is not necessary that the wife should exercise her authority at the same *mujlis*. See Rood-ul-Moohtar, Volume II, page 780).

And if the husband says to his wife, "Divorce thyself if thou pleaseth" and another man says to her, "Emancipate my slave if thou pleaseth," and the woman commences with the manumission of the slave, before divorcing herself, the authority to divorce shall go out of her hands (and *vice versa*); because, (says Mahomed) the reason is this, that the woman commenced (or occupied herself with) an act which was other than divorce.

2375. (1475.) A man says to his wife, "Thou art divorced, if such and such a man does not wish thy divorce to-day;" the so-and-so says (before the expiry of the day), "I do not wish": the woman shall not become divorced; because (the day not having expired) it is (still) competent to him to express a wish in (what remains of) the day.

2376. (1476.) A man says to his wife, "Thou art divorced once, if thou pleaseth:" she says, "I will, half of one:" she shall not become divorced.

2377. (1477.) A man says to his wife, "Divorce thyself once completely (*bain*) if thou pleaseth;" the woman divorces herself once by way of a reversible (or *Rujue*) divorce: no divorce shall be caused according to the view of Aboo Yusoof, on whom be peace, and that is to be inferred (*Kyas*) from the view of Aboo Haneefa, on whom be peace; (because he held that the exercise of authority must be in terms of the authority given).

2378. (1478.) And if the husband says to his wife, "Divorce thyself once, so that I may have power to revoke it, if thou pleaseth;" she then divorces herself once (*bain* or) completely: one reversible (or revokable) divorce shall be caused, according to the view of Aboo Yusoof, on whom be peace; because the woman's wish for a (*bain* or) complete divorce, involves her wish for a divorce generally (or unqualified, *i.e.*, simple divorce; and an unqualified divorce, that is, a divorce without an adjective to qualify it, is always reversible): and no divorce shall be caused according to inference (*Kyas*) from the view of Aboo Haneefa, on whom be peace; because the woman has not exercised the wish (with such quality annexed to it) as was entrusted to her; and, therefore, the divorce shall not be caused; just as if a man says to his wife, "Divorce thyself once" and she divorces herself thrice: no divorce shall be caused according to the view of Aboo Haneefa, on whom be peace, (although three involves one. See paragraph 1471).

2379. (1479.) A man says to another man, "Divorce my wife, of whatever nature God wishes and you wish;" the addressee divorces the woman: the divorce shall not be caused.

So also if the man says to his wife, "Thou art divorced if God wishes and you wish:" no divorce shall be caused (even if the woman wishes; because in addition to her wish, God's wish must also be found).

2380. (1480.) A man says to his wife, "Thou art divorced if thou pleaseth, thou pleaseth, thou pleaseth;" the woman says, "I have wished:" no divorce shall be caused until she says thrice, "I have wished."

2381. (1481.) And if he says to his wife, "Thou art divorced, whenever (*Muta*) thou pleaseth;" she says in the same *mujlis* or afterwards, "I do not wish:" her authority shall not go out of her hands (because she might wish again, the authority being general).

So also if he says, "Thou art divorced whenever (*Muta*) thou refuseth (to divorce thyself);" the woman says, "I do not refuse" (the force of the condition shall still continue and the divorce shall be caused whenever she refuses).

2382. (1482.) And if the husband says to his wife, "Divorce thyself thrice, if thou pleaseth;" she says, "I am divorced:" no divorce shall be caused (because she has not wished three divorces).

2383. (1483.) And if he says "Divorce thyself, if thou pleaseth;" the woman says, "Verily do I wish to divorce myself:" this is void (and the divorce shall not be caused; because she has merely expressed a wish to divorce herself in future, whereas she ought to have divorced herself then and there in the same *mujlis*, and she cannot exercise the authority of divorcing herself afterwards, the conditional sense having been expressed by the word "if" and not by the word "whenever" or *muta*).

2384. (1484.) A man says to his wife, "Divorce thyself, when (*isā*) thou pleaseth;" the man then becomes insane without any lucid interval; the woman then divorces herself: Mahomed, on whom be peace, says, that all matters in which the husband has power of revoking his words, become void by reason of his insanity (and in this case his expression amounts to giving authority to the wife on his behalf to divorce herself by way of Tufweez—See para. 1474—In case of Tumleek the owner has authority to revoke before acceptance by the donee. Therefore, the authority in ques-

tion becomes void by reason of his insanity; because the said authority was revokable); and matters, in which the man has no power of revoking his words, are not rendered void by insanity (*e.g.*, "If thou enter the house thou art divorced").

2385. (1485.) A man says to his wife, "Thou art divorced if thou pleaseth one (divorce), *and* if thou pleaseth two;" the woman says, "I have verily wished thrice:" she shall become divorced thrice (because the effect of *and* was to give her authority to give three divorces).

2386. (1486.) And if he says to his wife, "Thou art divorced thrice and such and such a woman once, if thou pleaseth;" the wife wishes one divorce to the such and such a woman; the such and such a woman shall become divorced once, and her authority to divorce herself thrice shall become void (that is, "If thou pleaseth" being used after both, it is not necessary that the wife should express the two wishes at once in order to give effect to the expression. She might express her wish in favour of the divorce of both, and her wish shall have effect given to it. She might wish the divorce of one, and her wish shall, in this case, also have effect given to it, but in this case she cannot: after having wished the divorce of one, wish the divorce of the other. See paragraph 1474).

2387. (1487.) A man says to his wife, "If thou wisheth and if thou dost not wish, thou art divorced:" this case presents itself in various forms.

One of them is, when the man makes mention of the wish first and says, "If thou wisheth and if thou dost not wish, thou art divorced."

Or (secondly) he might mention the divorce first, and say, "Thou art divorced, if thou wisheth and if thou dost not wish."

Or (thirdly) he might mention the divorce in the middle of the speech and say, "If thou wisheth thou art divorced and if thou dost not wish."

Each of these three forms subdivides itself into two classes, one of which is, when the man repeats the conditional particle and says, "*If* (*In*) thou wisheth and *if* thou dost not wish, thou art divorced: or (secondly) he does not repeat the conditional particle but uses the conjunction ("and" only) and says, "If thou wisheth and dost not wish, thou art divorced."

And words (by which the husband can express the condition on which the divorce depends) are (of) three (kinds): wish (or pleasure of the woman), and (her) refusal and (her) abomination (or abhorrence on her part).

Then if he does not repeat the conditional particle but uses (only) the conjunction, the divorce shall not be caused in any of the three cases, whether the divorce is mentioned before the wish, or is mentioned after, or is mentioned in the middle; because in the event of the conjunction (and) being used (and the conditional particle not being repeated as when he says, "If thou wisheth and dost not wish, thou art divorced" or "Thou art divorced, if thou wisheth and dost not wish," or "If thou wisheth, thou art divorced and dost not wish,") the divorce shall relate both to the wish and the absence of the wish; just as if a man says, "If thou eateth and drinketh, thou art divorced;" in which case the divorce has relation to both (the acts, so that if she only drinks or only eats no divorce shall be caused); but the combination of wish and its absence cannot be conceived (at one and the same time), and, therefore, no divorce shall ever be caused.

And if the man repeats the conditional particle and uses the words indicative of wish before (or antecedently) saying, "If thou wisheth and if thou dost not wish, then thou art divorced:" the divorce shall never be caused; because, in the event of the condition being mentioned before (or antecedently), the divorce appertains both to the wish and the absence of wish; just as if a man says, "If thou shalt eat and if thou shalt drink, then thou art divorced," in which case, the divorce is dependent on both the events. Therefore, the oath (of divorce) in this case is not valid.

So also (divorce shall not be caused) if he says, "If thou wisheth and if thou refuseth then thou art divorced," or if he mentions the word "Abhoreth" in the place of "refuseth."

And if he mentions the divorce before the wish, saying, "Thou art divorced, if thou wisheth and if thou dost not wish;" and the woman says in (her same) *Mujlis*, "I have wished:" she shall become divorced, on account of the existence of the wish: so also if she gets up at the *Mujlis*, before saying anything, she shall become divorced; because in the event of the divorce being mentioned first (or antecedently), the divorce appertains to either of the two events (and not to both together); just as if a man says, "Thou art divorced if thou eateth and if thou drinketh." Therefore when (in the case of the divorce under consideration) she says,

"I have wished," she shall become divorced on account of the existence of the wish: so also if she gets up at her *Mujlis* (or meeting) before saying anything, she shall become divorced on account of absence of wish (because getting up at the meeting is indicative of absence of wish, so also if she does not express a wish or does not stand up and the *Mujlis* changes, then also the absence of wish shall be found).

And if the man mentions the divorce in the middle and says, "If thou wisheth, then thou art divorced, and if thou dost not wish;" then this is tantamount to using "divorce" before both the conditional events, for reasons to be found in the Jamai-ool Kubeer.

And if the man uses the word "refuseth," and mentions "divorce" first, saying, "Thou art divorced, if thou wisheth and if thou refuseth," and the woman says, "I have wished" or says, "I have refused:" the divorce shall be caused; because either of the two events constitutes the condition; and if she gets up at the meeting before saying anything, the divorce shall not be caused; because one of the two events (*i.e.*, wish or refusal) constitutes the condition, and neither of them is found here. That the wish is found wanting (when she does not say anything but gets up) is apparent; because ordinarily getting up is indicative of absence of wish; and so also refusal is found wanting (when she merely gets up) because refusal is an act, and an act is known by the doing of it (*Jidd*) contrary to the case of absence of wish (in which case divorce is caused by her getting up, because standing up denotes absence of wish). And both wish and refusal are expressed by word of mouth, and not by an act of the mind: and abhorrence is tantamount to refusal.

And if the man mentions divorce in the middle, and says, "If thou wisheth then thou art divorced, and if thou refuseth;" then this is tantamount to his mentioning divorce before (or antecedently).

Mohamed, on whom be peace, says, that all this is when the man has no (particular) intention for anything (that is, when he has no intention of causing divorce immediately or of making it conditional), but if the man intends the causing of immediate divorce, and not making the same conditional, the divorce shall be caused in all cases, whether the man mentions the divorce first, or mentions it last, or mentions it in the middle; because when the man intends the immediate causing of a divorce, he in effect says, "Thou art divorced, whether thou wisheth or dost not wish" (and in this view the conditional meaning of the word "if" is avoided), or says, "Thou art divorced, whether thou wisheth or thou refuseth."

And if the husband (instead of saying, "Thou art divorced, if thou wisheth and if thou refuseth) says to his wife, "Thou art divorced when (*Muta*), thou wisheth and thou refuseth," then this (is not confined to the same meeting but) relates to the same meeting or to another meeting (that is, it is not necessary that her wish or refusal should be expressed at the same meeting as in the case when the condition is expressed by "if;" with the word "*Muta*," the wish or refusal might be expressed at another meeting and whenever expressed, the clause would be operative): and she shall not be divorced until she says, "I have wished" or "I have refused;" contrary to the case where the man says, "Thou art divorced, *if* thou wisheth and thou refuseth," because this (latter) case is confined to the same meeting (that is, in this case the woman must express her wish or refusal at the same meeting); so that (in the case of "if") if she uses words indicating either of the two conditions (of wish or refusal), her authority ceases (and one divorce shall be caused if she says "I have wished," and her right to divorce herself ceases there, and she cannot cause another divorce by saying "I refuse:") but the expression "when" (*Muta* or "whenever," or "at any time") is used for time, and therefore her authority shall not cease if she uses one of the expressions on which the condition depends (those expressions being "I wish" or "I refuse;" but on the other hand, having caused one divorce on herself by the use of one expression, she can cause another by again using the same expression or the other expression; in other words, by the use of this word *Muta*, the authority is capable of repetition). Dost thou not see (an argument to shew that by the use of the expression "*Muta*," the authority is not confined to the same meeting) that if the husband says to his wife, "Thou art divorced, at any time (*Muta* or whenever) thou wisheth," and the woman says at the same meeting or afterwards, "I do not wish," her authority does not go out of her hands, and it is competent to her to "wish" the divorce after this.

So also if he says, "Whenever (*Muta*) thou refuseth (this is also not confined to the same meeting).

2388. (1488.) And if the husband makes the divorce dependent on the wish of God saying, "Thou art divorced, if it pleaseth God," or says, "if God likes it," or "if God consents," or "if God intends," or "if God has destined," divorce shall not be caused (because nobody knows whether God wishes or not).

So also if he says, "Thou art divorced, what God pleaseth" or

says, "Thou art divorced only if it pleaseth God," or says, "If God does not wish."

2389. (1489.) And if he says, "Thou art divorced howsoever (*Kaifa* —whether reversible or irrevokable) God wisheth:" one reversible divorce shall be caused (because the fact of divorce is not dependent on God but only its quality; and in the absence of specification, the *Shera* says that by the use of the expression, "Thou art divorced" one reversible divorce shall be caused, and, therefore, that must be God's wish).

So also (one reversible divorce shall be caused) if the husband says, "Thou art divorced, although God wisheth (*i.e.*, whether God wishes or not)."

2390. (1490.) And if the husband says, "If it pleaseth God, then thou art divorced:" the woman shall not become divorced, according to all (that is, Aboo Huneefa, Yusoof and Mohamed. See paragraph 1488).

2391. (1491.) And if he says, "If it pleaseth God, thou art divorced (omitting the word "then" before "thou:") the woman shall not become divorced, according to Aboo Yusoof, on whom be peace; but she becomes divorced according to Mohamed, on whom be peace; (because the latter says that when the word connecting one part of the sentence with the other is wanting, then the last part must be treated as an independent sentence). But the Fatwa is according to the view of Aboo Yusoof, on whom be peace; (because in the effectual clause following the conjunction "if," the word "then" is not always used).

So also if he says, "If it pleaseth God *and* thou art divorced; (according to Aboo Yusoof no divorce shall be caused, but according to Mohamed, it shall be caused).

2392. (1492.) Aboo Yusoof and Mohamed, on whom be peace, have differed whether—in the event of the divorce clause being joined to the exception (*viz.*, the words, "If it pleaseth God") under circumstances where the exception is valid (or effectual and not surplusage, it being surplusage if for instance it is used after a break and some time after the use of the expression, "Thou art divorced")—the whole put together (that is, the whole of the expression, "Thou art divorced if it pleaseth God" or "If it pleaseth God then thou art divorced") constitutes an oath (which the expression undoubtedly would have been if instead of the conditional clause being the wish of God, any other conditional clause had been used): Aboo Yusoof, on whom be peace, says, that the same amounts to an oath,

so that if a man says to his wife, "If I shall take oath by thy divorce, then my slave is free" and he then says to her, "Thou art divorced, if it pleaseth God" and he says so in a way so that the exception (that is, the expression "if it pleaseth God") is valid according to both Aboo Yusoof and Mahomed, then the man shall commit a breach of his oath, according to Aboo Yusoof, on whom be peace, but Mahomed, on whom be peace, says, that (the expression "Thou art divorced if it pleaseth God") does not amount to an oath, and the man shall not commit a breach of his oath (regarding the freedom of the slave).

And regard being had to the same difference of opinion, if the man says to his wife, "Thou art divorced if thou enter the house and my slave is free if thou speak to so and so if it pleaseth God;" (the meaning of it being that "Thou shalt be divorced in the event of thy entering the house, if it pleaseth God, and my slave shall be free in the event (of thy speaking to the so and so, if it pleaseth God;") then, according to the view of Mahomed, the exception shall relate both to the divorce and the manumission (and not only to the manumission, to which it adjoins), and according to the view of Aboo Yusoof, on whom be peace, the exception shall relate (only) to the second oath (and shall not apply to both) just as if instead of using the exception, the man had used a condition. (That is to say, an oath or Yameen must always follow the preceding clause without intermission; and according to Mahomed's view an exception is not an oath, but is an avoidance of what precedes; therefore, not being an oath, the rule, which requires absence of intermission, does not apply, so that the exception shall relate to both the clauses; but Aboo Yusoof says that the exception being an oath, its operation shall be confined to the clause to which it is joined without intermission and break).

2393. (1493.) And if the man says to his wife, "Thou art divorced, with the intention of God" or "with God's love" or "with God's pleasure" or "with his consent" (that is, if God intends or loves divorce, or is pleased with or consents to divorce); the woman shall not become divorced.

So also if instead of "with (*bai*)" he uses the word "*in* (or *fee*)" and says, "Thou art divorced *in* the will of God" or "in the intention of God" or "in the command of God" or "in the mandate of God" or "in the decree of God" or "in the power of God" or "in the destination by God," the woman shall not be divorced (see paragraph 1395 as regards the use of the word *in* or "*fee*.")

2394. (1494.) And if he says, "Thou art divorced in the knowledge of God" or "in his knowing," the woman shall become divorced (because the expression means "If God knows;" but God knows every thing); and if he uses the particle "lam" (or for) saying, "Thou art divorced for the wish of God" or "for his love (of divorce)" or "for the decree of God" or such like expressions, the woman shall become divorced, (because there is no condition here. See paragraph 1395).

And if he says, "Thou art divorced with the aid of God" or "with the command of God" or "with the decree of God" or "with the knowledge of God" or "with the power of God," the woman shall become divorced.

2395. (1495.) And one of the conditions for the validity of the exception (that is, to make it operative and effectual) according to our Mashaikhs, on whom be peace, is, that the exception should be capable of being heard (that is, it must be audibly uttered) so that if a human being should take his ear close to the speaker's mouth, he may hear it: and it is valid for the deaf to use the exception.

And another condition relating to the validity of the exception is, that the same should be joined (to the preceding clause): and the exception does not become disjoined (interrupted) by the taking of breath, (See paragraph 1524 *post* and Vol. I, Futawai Alumgeree, page 636) or by sneezing, and not by belching (See paragraph 1524 *post*): and (use of words) addressing the object (*Nida*) between the exception and what has preceded it, does not amount to an interruption (so as to invalidate the exception); so that if a man says, "Thou art divorced, Oh Oomra, if it pleaseth God," the exception is valid; so also if he says, "Thou art divorced, Oh adulteress, if it pleaseth God," the exception is correct; so also if he says, "Thou art divorced thrice, Oh such and such a woman, excepting once," the exception of one divorce shall be valid, and two divorces shall be caused: and if he says, "Thou art divorced so that thy heart might gladden, if it pleaseth God," these words (which are *Lugho* or unnecessary) shall be held to have caused a break, and, therefore, the divorce shall be caused, and the exception shall not be valid (or operative and effectual).

2396. (1496.) A man says to his wife, "Thou art divorced, if it pleaseth God thou art divorced:" according to us the exception shall relate to the first clause, and one divorce shall be caused (immediately) as the effect of the second clause; but according to the view of Zoofar, on

whom be peace, the exception shall relate to both the clauses, and no divorce shall be caused.

2397. (1497.) And if the man says, "Thou art divorced thrice if it pleaseth God thou art divorced:" the woman shall become once divorced immediately.

2398. (1498.) And if the man says, "Thou art divorced once if it pleaseth God and thou art divorced twice if it does not please God:" the learned lawyers have said that no divorce shall be caused. And this answer is obvious according to Mahomed, on whom be peace; because according to him, the exception avoids the result whether it is used before or after (See paragraph 1191); and the man's expression, "If it pleaseth God" and his expression, "If it does not please God" are each of them exceptions, and, therefore, each expression of divorce is rendered void. (See paragraph 1492).

But according to the view of Aboo Yusoof, on whom be peace, exception is a condition, and, therefore, the first (expression of) divorce shall depend on the will of God, and the second (expression of) divorce shall depend on the absence of God's pleasure; and the pleasure of God is hidden from us, and we cannot be aware of its existence until it is made known, and therefore divorce shall not be held to have taken place; and because, on account of the second expression, the divorce is made dependent on the absence of God's pleasure, therefore, if we hold that that divorce has taken place (as the result of the second clause) then (it follows that) God's pleasure has become known, (because nothing in the world takes place except by the will of God, and therefore the divorce, which we have assumed to have taken place as the result of the second expression, must be on account of the will of God) and therefore the second expression (itself) becomes nullified (because it deals with the absence of the will of God, and here we have got divorce as the result of the will of God) whilst at the same time operation has been given to it (on the assumption that the divorce has taken place); and therefore the divorce shall not be valid.

2399. (1499.) And if a man says to his wife, "Thou art divorced this day once, if it pleaseth God, and if it doth not please God (to-day) then two divorces," and the day expires, and the woman is not divorced (that is, the husband does not give a divorce, and she does not become divorced as a consequence of the first clause on account of the exception; thus shewing that it has not pleased God that she should become divorced), Aboo

Yusoof, on whom be peace, says, that two divorces shall be caused; because if it had pleased God that one divorce should be caused, God would have necessarily caused to be pronounced from the man's lips one divorce on that day, and, therefore, when the day expired, and she did not become divorced, God's pleasure became non-existent; but if the man divorces her once that day, then more than that shall not be caused.

2400. (1500.) And if the man says, "Thou art divorced thrice and thrice, if it pleaseth God:" then according to the view of Aboo Haneefa, on whom be peace, the woman shall become thrice divorced (as the result of the first portion of the expression, which is not made dependent on the will of God, there being an interruption or break).

2401. (1501.) So also if a man says to his slave, "Thou art free and free, if it pleaseth God:" the slave shall become free according to Aboo Haneefa (as the result of the first portion of the expression which is not made dependent on the will of God); because the second asseveration is a surplusage (because the slave could only be free once for all), and, therefore, it shall be held to have caused a break between the exception, and what precedes it: and his two companions have said that the exception is valid and no divorce or freedom shall be caused.

And as the result of this difference, if the man says, "Thou art divorced thrice and once if it pleaseth God:" then according to Aboo Haneefa, on whom be peace, three divorces shall be caused (because the mention of one after three is *Lugho* or surplusage, as three includes one).

And if the man says, "Thou art divorced once and thrice if it pleaseth God, the exception shall be valid, according to them all (because the mention of three after one is not *Lugho* or surplusage, and, therefore, the exception shall be valid, and the divorce shall not be caused).

2402. (1502.) A man divorces his wife thrice; then two just men depose before him, "You verily used the exception (*Istisna*, or the words 'if it pleaseth God') adjoined to the words of divorce;" and the man does not remember this circumstance: the learned lawyers have said that if the man, when in a state of anger, gets into such a condition that, what he does not intend escapes his mouth, and that he does not remember what escapes his mouth, then it is permissible to him to believe the statement of the witnesses, otherwise not.

2403. (1503.) When a woman claims a divorce (that is, lays a claim before the Kazee that her husband had divorced her); and the husband

says (to the Kazee), "I said to the woman, 'thou art divorced, if it pleaseth God;'" and the woman falsifies him regarding his allegation of having used the *Istisna* (or exception): it is said in the Zahir-i-Rawayet, that the word to be accepted is that of the husband; but, according to some of the modern writers, the word of the husband shall not be accepted unless supported by proof by witnesses (*byyuna*); but if the husband says to the Kazee that what he did was that he said "I divorced thee yesterday, and I said if it pleaseth God," then, according to the Zahir-i-Ruwayet, the word to be accepted shall be that of the husband.

And it is stated in the Nuwadir, that there is a difference between Aboo Yusoof and Mahomed, on whom be peace: the author of the Nuwadir then goes on to say that, according to the view of Aboo Yusoof, on whom be peace, the word of the husband shall be accepted, and the divorce shall not be caused; but that according to the view of Mahomed, on whom be peace, the divorce shall be caused and the word of the husband shall not be believed; and this (latter) view is that which is accepted, and the *Futwa* is given accordingly in order to be on the safe side (and to keep to the side of caution) in the matter of a woman's person in these times when people are prone to mischief.

2404. (1504.) And if the husband has divorced his wife in the form of a *Khoola* (without the husband at the time of the divorce making any mention of the exchange or consideration for the *Khoola*); and the husband then claims to have used the exception in the *Khoola*: then, according to the Zahir-i-Ruwayet, this, (that is, *Khoola*) and divorce (See paragraph 1503) are equal (in respect of the effect of the use of the exception); but if the husband mentions the exchange or consideration in the *Khoola* saying, "I have given thee thy *Khoola* in consideration of so much, and thou hast accepted;" the husband then claims to have used the exception: Isam and others have said that the man shall not be believed by the Kazee when he accepts property (or reward) for the *Khoola*: and by "accepts property (or reward) for the *Khoola*," they mean the mention of consideration in the *Khoola* and not really receiving the consideration; and just as the Kazee will not believe the husband in what we have stated (*viz.*, that he used the exception) the woman also will not believe him (and will not live with him).

And if witnesses depose to the *Khoola* or divorce (having been given by the husband) without the exception: it is said in the Syur-ool Kabeer

(that this question, whether the exception was used or not shall have to be treated in the following way) that when the husband and wife differ, the man saying, "I said Messiah is son of God as the Christians say" (when the man shall not become a Kafir and the marriage shall not be annulled); but the woman, on the other hand, says thou didst not say "as the Christians say" (the effect of which is to make the man a Kafir when the marriage shall be annulled): the word to be accepted shall be that of the husband, on his oath: (so also in the case of the dispute regarding the use of the exception, the husband's words shall be believed).

And if the woman produces witnesses, who say, "We did hear the husband say 'Messiah is the son of God' and that the husband did not say anything else;" whilst the husband says, "I said 'as the Christians say,' but they did not hear:" the Kazee shall verily give effect to the evidence of the witnesses (of the woman) and shall effect separation between him and his wife, (and according to this analogy the case involving exception must also be treated in the same fashion).

But if the witnesses (cited by the woman) say, we do not know whether the man said this or not (that is, whether the husband used the words "as the Christians say") but that we did not hear from the husband anything besides his words "Messiah is the son of God:" the Kazee shall not believe the evidence of the witnesses (because they cannot say whether the words were used or not) until those witnesses depose that the husband did not say, with the words, "Messiah is the son of God" other words (to the effect "as Christians say.") And the learned lawyers have treated the husband's claim of having used the exception whilst divorcing his wife in the same way as the above case.

Shamsh-ool Ayma Sarukhsy, on whom be peace, has said, that this is one of those cases in which evidence of a negative fact is accepted.

And if the exception has come out of his mouth without his intention, or if he has used the exception without knowing its meaning, the effect of the same is already stated. (See paragraph 997.)

2405. (1505.) A man says to his wife, "Thou art divorced, and divorced, and divorced, if it pleaseth God:" the exception is correct, and the divorce shall not be caused; (because repeating divorce three times is saying, "Thou art thrice divorced," and, therefore, there is no break or interruption; but if he had repeated divorce four times, there would have been a break).

2406. (1506.) And if the man says, to his wife, "Thou art divorced, and divorced, and divorced, and divorced, if it pleaseth God:" the learned lawyers have said that, according to inference (*Kyas*) from what Aboo Huneefa, on whom be peace, has said, three divorces shall be caused; because something (that is, the fourth word of divorce which is a surplusage) intervened between three divorces and between the exception, which is of no effect, and therefore that thing is (*Lugho* or) a mere surplusage; and therefore the exception shall not be correct (or operative,) just as if the husband after mentioning three divorces makes a pause before coming to the exception.

And according to the view of Aboo Yusoof and Mahomed, on whom be peace, no divorce shall be caused.

2407. (1507.) Moulana (Kazee Khan, the author of these Futawa), on whom be peace, has laid down that, if the husband says to his wife, "Thou art divorced twice and twice, except one," then the woman shall become thrice divorced (because the exception here takes away one out of two plus two (and no *Lugho* matter intervenes).

2408. (1508.) And if the husband says to his wife, "Thou art divorced twice and twice except twice:" two divorces shall be caused.

2409. (1509.) And if he says, "Thou art divorced twice and twice except thrice:" the woman shall become thrice divorced; because it is not possible to give effect to this expression as an exception of three from two, whether it be the first two or the second two; and it is not possible to give effect to the expression as an exception of three from the two twos taken together; (because an exception relates to that to which it is nearest, see Futuh-ool Kadeer, Vol. 2, page 233); the expression therefore becomes an exception, so that one and a moiety must be taken out of each of the two twos, and, therefore, the exception necessarily becomes void. (See Rudd-ool Moohtar, Vol. 2, page 845, and Futawai Alumgeree, Vol. I, page 633, and Door-ool Mooktar, page 250 of the Edition of 1856. In causing divorce a fraction is taken as a full number, but in excepting a fraction the fraction nullifies the whole of the exception. See paragraph 1534 *post*. Be it noted that the second "twice" is not a *Lugho* or surplusage; because after two divorces the man still has one divorce in his power; but if he says, "Thrice and thrice except four" as in paragraph 1512 *post*, the second thrice becomes a surplus interruption,

and therefore the exception in this case is void on account of the intervention of a surplusage. See also paragraphs 1532 and 1551 *post*).

2410. (1510.) When a man says to his wife, "Thou art divorced four times except three:" one divorce shall be caused.

2411. (1511.) So also if he says, "Thou art divorced ten times except nine:" this shall amount to one divorce.

2412. (1512.) And if the husband says to his wife, "Thou art divorced thrice and thrice excepting four:" Aboo Huneefa, on whom be peace, says, that three divorces shall be caused; because the second "thrice" is a surplusage, and, therefore, the same becomes an interruption between the exception and the word "thrice" mentioned first. And Mahomed, on whom be peace, says, that two divorces shall take place; because the husband joined the first "three" to the second "three," by the conjunction "and," and he, therefore, in effect said, "Thou art divorced six times except four;" and, therefore, two divorces shall be caused.

2413. (1513.) And if the husband says, "Thou art divorced thrice except once and twice:" it is reported from Aboo Huneefa, on whom be peace, that he held that three divorces shall take place; (because the exception is void being an exception of a thing from itself) just as if he had said, "Thou art divorced thrice except thrice." And Aboo Yusoof, on whom be peace, says, that two divorces shall be caused; (because the exception of "once" having become operative on account of its close proximity to the word "except," there remained two; and if from this two, the two involved in the word "twice" is also to be excepted, then there will be an exception of three from three; see paragraph 1516 *post*); and therefore the exception of "once" is valid, and that of the rest void.

2414. (1514.) And if the man says, "Thou art divorced once, and once, and once, except three:" the woman shall become thrice divorced, just as if he had said, "Thou art divorced thrice except thrice."

2415. (1515.) So also if the man says, "Thou art divorced once, and once, and once, except once, and once, and once:" the woman shall become thrice divorced (the exception is inoperative, as it amounts to an exception of the thing from itself).

2416. (1516.) And if a man says to his wife, "Thou art divorced thrice, except once, and once, and once:" the woman shall become divorced thrice; because the man has brought together the things excepted, by the conjunction "and" so that the husband in effect says, "Thou art divorced thrice except thrice."

And Aboo Yusoof, on whom be peace, says, one divorce shall take place, and the exception is correct (or valid and operative) in respect of the first "one" and the second "one;" because this amounts to excepting a smaller from a larger quantity (that is, it amounts to excepting two from three) and that the exception of the remainder (that is, the third "one") is not correct, in order to avoid the result of excepting a thing from itself.

2417. (1517.) And if the man says, "Thou art divorced thrice except once or twice," and dies before explaining himself (whether he intended to give effect to the expression "once" or to the expression "twice" contained in the exception in the alternative form) then, according to some traditions from Aboo Yusoof, on whom be peace, one divorce shall be caused; but two divorces shall be caused according to Mahomed, on whom be peace: so that according to Aboo Yusoof, on whom be peace, the (result is that the) exception operates on the larger number (of the two numbers mentioned in the exception, that is, two) and the divorce caused is confined to the smaller number (that is one); but according to Mahomed, on whom be peace, the number excepted is the smaller number (of the two numbers mentioned in the exception, that is, one) and therefore two divorces shall be caused. But on the other hand, it is stated in the book on Wusaya (or Wills) that in case there is a doubt as to the operation of the exception (and the doubt arises when the two numbers are used in the alternative as in the case given, and the doubt is, whether it will operate as regards "once" or "twice") then according to the view of Aboo Yusoof, on whom be peace, the exception must relate to the smaller number (that is, the lesser of the two excepted things must be excepted) because, according to him (that is, Aboo Yusoof), exception means deducting; and when doubt arises whether a smaller number or a larger number is to be excepted, then only that is to be excepted regarding which there is certainty; (*e.g.*, in the case given the doubt is whether two is excepted or one is excepted; then if we hold that two is excepted, that two includes one, and therefore there is no doubt as to one, and therefore one should be excepted and two divorces should be caused); but that, according to the view of Mahomed, on

whom be peace, exception means (and implies) a statement of the remainder after (having deducted) the thing excepted, and, therefore, any doubt which arises regarding the exception effects the whole of the expression with doubt, and therefore nothing shall be established (by the whole of the expression) but that in regard to which there is (absolute) certainty (and, therefore, in the case given, doubt arises whether the whole expression meant to assert one or two: if the exception relates to one, then the expression means to assert two, but if the exception applies to two, then the expression means to assert one; therefore the certainty is, that the expression meant to assert one).

And it is stated in the chapter on Ikrár when a man says to another, "For thee, are due against me a thousand except hundred or fifty," then it is stated in the Nuwadir of Aboo Soolyman, on whom be peace, that what is due against the man is nine hundred and fifty (relying on the view of Aboo Yusoof, that exception means taking off, and therefore what is certain must be excluded): and it is stated in the traditions from Aboo Hufs, on whom be peace, that what is due against the man is nine hundred; and this latter view is correct (relying on the view of Mahomed that the whole must be taken as a net statement, and therefore that in which there is doubt must be thrown away).

2418. (1518.) A man says to his wife, "Thou art divorced thrice except something:" she shall become divorced twice according to the Kazee (because the exception shall apply to one, that being certain).

2419. (1519.) When a man says to his wife, "Thou art divorced thrice except once to-morrow" or says, "Except once, if I speak to so and so:" no divorce shall be caused before the morrow arrives, or before the speaking takes place: and in the event of the speaking taking place or the morrow arriving, two divorces shall take place; because the principle is, that the thing from which something is excepted must be of the same quality (*jins*—kind or genus) with the thing excepted, and, therefore, when the thing excepted is made dependent on another thing or is referred to the morrow, then the thing from which exception is made must also be made dependent on that other thing or must refer to the morrow (and therefore no divorce shall be caused immediately).

2420. (1520.) When a man says to his wife, "Thou art divorced, Oh adulteress, thrice:" Aboo Haneefa, on whom be peace, says, that the woman shall become thrice divorced, but there shall be no punishment

for the man (for false imputation of adultery) nor will *Lian* be necessary on him: but Aboo Yusoof, on whom be peace, says, that the woman shall be divorced once (that is, as the result of "Thou art divorced") and the man shall be liable to punishment, because the consequences of a false imputation (*Kuzuf* or accusation) of adultery are more severe than the consequences of a divorce, and, therefore, the expression of adultery (that is, the man's expression 'Oh adulteress') shall be held to have caused a break between the word, "thrice" and the word "divorced;" and therefore one divorce shall be caused, (because the interruption caused does away with the effect of the expression "thrice" and the word "thrice" shall not relate to divorce at all, not being adjoined to divorce; but, on the other hand, Aboo Haneefa says, it must be read as occurring without any break at all and as relating to divorce).

2421. (1521.) And if a man says to his wife with whom he has not had sexual intercourse, "Thou art divorced, divorced thrice:" only one divorce shall be caused (because one divorce is sufficient for her).

2422. (1522.) A man says to his wife, "Thou art divorced thrice, therefore know thou, if God pleaseth:" the exception is valid (and operative and effectual, because the expression, "Therefore know thou" is not the introduction of unconnected words, and those words do not cause a break or interruption, and there shall be no divorce; the word "therefore" shewing that it is a part of the first expression).

2423. (1523.) If a man says, "Thou art divorced thrice, know thou, if God pleaseth" or says, "Go thou, if God pleaseth:" she shall become thrice divorced, and the exception shall be void (because the expression, "Know thou" without being introduced by "therefore" shews that it is an independent speech not related to the first portion of the sentence).

2424. (1524.) A man takes oath by the divorce of his wife and intends (that is to say, has a mind) to say at the end, "If it pleaseth God," when some person stops his mouth; then if he mentions the exception, after the person has let go his hold on his mouth, and mentions it immediately after (*Mousoolan*) the hand is removed from his mouth, the exception shall be correct (and operative or effectual), just as in the case of interruption caused between divorce and exception, by sneezing or belching (in which case the exception is valid, and no divorce is caused, see paragraph 1495).

2425. (1525.) A man intends to administer oath to another man, but fears that the swearer might use the exception: then the device in this matter for the man first mentioned is, that he should command the other man to say immediately after his oath and as adjoined to it (*Mousoolan*), "God is pure" or "I ask pardon from God," or to use such an expression that the exception would be invalid after it.

2426. (1526.) A man says, "By God I will not speak to so and so, may God pardon, if it pleaseth God:" the learned lawyers have held that this, in case of an oath relating to divorce, shall amount to an exception, morally speaking, (but according to the Kazee it shall not so amount, there being interruption, and therefore the Kazee shall not decree divorce).

2427. (1527.) A man says to his wife, "Thou art divorced thrice or not (*Au la*)," and the Persian of it is "or not:" no divorce shall be caused. So also if he says, "Thou art divorced and except (*Wo illa*)" and the Persian of it is, "and but" (no divorce shall be caused).

2428. (1528.) So also (no divorce shall be caused), if he says, "Thou art divorced thrice if it be (*In kana*) and the Persian of it is "if it be." So also if he says, "Thou art divorced thrice if (*in*)" and the Persian of it is "if (or) *Agur*."

So also if he says, "Thou art divorced thrice, if not (*in lum*)" and the Persian of it is "if not—*Agur-na*."

So also if he says, "Thou art divorced thrice if it be not (*In lum yukoon*)" and the Persian of it is "*Agur na buwud*—if it be not."

Because all these expressions are expressions indicative of condition; and whenever a condition adjoins the effect, the condition takes away from the effect the quality of instantaneous operation (or *Tunjeez* and *Eekaa*).

2429. (1529.) A man takes an oath on the divorce of his wife that he will not speak to so and so except by mistake (saying, "I will not speak to so and so for ever except by mistake; and if I speak except by mistake, my wife is divorced); he then speaks to the so and so by mistake, and then speaks to him knowingly: he shall commit a breach of his oath, because what he excepted was "speaking by mistake" from absolute speaking and, therefore, what remains over and above the speaking by mistake, remains included in the oath (that is, the oath includes intentional speaking).

2430. (1530.) And if a man says to his wife, "Thou art divorced if I speak to so and so unless I do so by mistake" (*Illa un*) and speaks by mistake, and then speaks knowingly: he shall not commit a breach of his oath, because the expression "unless" (*Illa un*) is used to shew the point of limit (or *Ghait*, that is, the oath means, "I will not speak to so and so up to the time I forget," therefore when he forgets, the prohibition reaches its point of limit, and the oath comes to an end, contrary to the case in 1529, where the limit of absence of speaking is not a mistake). God says [see Vol. I. of these Lectures, page 12, paragraph 75 (71),] "You will not (yourself) take it unless (or *Illa un*) you shut your eyes to it;" and he intends by this, *Ghait* or termination (that is, the period of not taking lasts as long as the eyes are open, and the period of not taking terminates by the closing of the eyes, and therefore the closing of the eyes is the *Ghait* or termination of the period of not taking). Therefore, if he speaks by mistake, his oath comes to an end, and he shall not commit a breach of his oath afterwards.

2431. (1531.) A man says to another, "I shall certainly come to thee up to (*Ila*) ten days except that (*Illa un*) I am dead" and intends in his mind, "If I do not ever die;" (that is, "I shall certainly come to thee within ten days if I live for ever, and if I do not live perpetually but die like others, I shall not come);" then if his oath is in reference to God, he shall not commit a breach of his oath (because the words are open to the construction which the man says he intended); but if his oath relates to divorce or emancipation, he shall not be believed (because the apparent meaning of his oath is, "If I live for ten days I shall come to thee within ten days).

2432. (1532.) A man says to his wife, "Thou art divorced twice and once, except once:" two divorces shall be caused, because bringing together one and two by the conjunction "and" is the same as expressing a collective sense by a collective expression; so that he in effect says, "Thou art divorced thrice except once," therefore two divorces shall be caused. (See paragraphs 1509 and 1551 *post*).

2433. (1533.) And if a man says to his wife, "Thou art divorced thrice, other than (*Ghyr*) three, other than two:" then Mahomed, on whom be peace, says that two divorces shall be caused.

And if he says, "Thou art divorced ten times, except nine, except one:" two divorces take place.

And the principle in these cases (where after one number, there are two or more numbers mentioned by way of exceptions, see Rudd-ool Moohtar, Vol. II, page 847), is, that the first mentioned number shall be put on the right hand (*i.e.*, on the left hand in English), and the second number shall be put on the left hand (*i.e.*, on the right hand in English), and then the third number shall be placed again on the right hand (*i.e.*, on the left hand in English), and then he shall subtract the sum of what is on the left side (*i.e.*, on the right side in English) from what is on the right side (*i.e.*, on the left side in English), and what remains on the right side (*i.e.*, on the left side in English) after the subtraction, shall denote the number of divorces caused on the woman—

3 first mentioned; 3 second mentioned.
2 third mentioned.

—

5

5 minus 3=2

10 9

1

—

11

11 minus 9=2.

2434. (1534.) And if he says, "Thou art divorced thrice except one or half of one:" three divorces shall be caused; because the man creates a doubt in the thing excepted (by using the word "or"): and therefore the least number is the thing excepted, (see paragraph 1517), so that he, in effect, says, "Thou art divorced thrice except half of one" (and the exception of a fraction is not valid, see paragraphs 1509 and 1551; what is certain shall be excepted and that is half: therefore "one" goes for nothing, but half for the purposes of exception amounts to nothing; therefore nothing is excepted).

2435. (1535.) So also if the man says, "Thou art divorced thrice except once or nothing:" three divorces shall be caused, because he makes no exception.

2436. (1536.) When a man says to his wife, "Thou art divorced twice, and twice and twice except four:" she shall become divorced twice.

And if he says, "Thou art divorced, thou art divorced, thou art divorced except once;" three divorces shall be caused (because there being

no "and" the exception shall relate to that which precedes it, and therefore this is a case of exception from the thing itself, and therefore the exception is void).

So also if he says, "Thou are divorced thrice, except once and once and once;" she shall become divorced thrice (the exception being void as being the exception of a thing from itself).

2437. (1537.) A man says to his wife, "Thou art *bain* (completely divorced)" intending thereby "thrice except once:" the woman shall become twice *bain* (that is, she shall become twice divorced and the two divorces shall be of the *bain* character). But Mahomed, on whom be peace, says, that she shall be once (*bain* or completely) divorced (the intention being disregarded, and the exception is disregarded, because he, in effect, says, "Thou art divorced once, except once.)"

2438. (1538.) So also if he says, "Thou art divorced thrice all *bain* or complete except once:" she shall become twice completely divorced.

2439. (1539.) And if he says, "Thou art divorced thrice completely except once," or says, "thrice *al-buttuta* (cut off) except once," two revocable divorces shall be caused (because when he uses the word *bain* in the plural number and says "all *bain*" as in paragraph 1538, this means that each divorce is *bain*; when he says thou art divorced thrice completely as in this paragraph, this means that three divorces shall, according to law, make you *bain*; therefore two divorces shall take place, but they shall be of the *Rujue* or revocable character).

2440. (1540.) So also if he says, "Thou art divorced thrice except one *bain*" or "One cut off or *al-buttuta*:" two revocable divorces shall be caused.

2441. (1541.) And if he says, "Thou art divorced thrice (which are) unlawful except once:" she shall be divorced twice with the husband having power of revocation: (it is prohibited to give three divorces at once; the man shall be sinful if he does so, although the three divorces shall be caused).

2442. (1542.) A man says to his wife, "If thou shalt enter the house, then thou art divorced thrice which shall not be caused on thee except after thou hast spoken to so and so;" the woman then enters the house: she shall become thrice divorced, and the condition of speaking to

so and so shall be void, (because a surplusage consisting of "which shall not be caused" is found here which avoids the exception).

2443. (1543.) And if he says, "Thou art divorced to-day thrice which will be caused on thee to-morrow:" the woman shall become divorced this day thrice (because the *Eekaa* or *Tunjeez* or *Insha* that is the causing of divorce must be instantaneously effective unless there is a condition, and here there is no condition or exception to postpone the *Tunjeez* or instantaneous effectuation of the divorce).

2444. (1544.) And if the man says to his wife, "Thou art divorced to-day, if it pleaseth Satan or it pleaseth the Angel:" no divorce shall take place (because the pleasure of Satan or the Angel cannot be known).

2445. (1545.) And if the man says, "Thou art divorced, whatever God wishes will happen:" no divorce shall be caused.

So also if he says, "Thou art divorced except what God wishes," or says, "except that God wishes:" no divorce shall be caused (because these are different forms of exception).

2446. (1546.) When a man says to his wife (with whom he has had intercourse), "Thou art divorced twice, no but (*la bul*) once (that is, not twice, but once):" she shall become divorced thrice (because two divorces were caused as soon as the words were spoken, and the husband has no power to remove the divorces so caused and one more shall be caused because the husband causes it).

And if he says, "Thou art divorced, not but (*la bul*) divorced," (that is, "No, not divorced by the first mentioned expression, but divorced by the second expression):" the woman shall be divorced twice (that is, once by the first expression, which, when used, causes instantaneous divorce, although by the particle subsequently used the man seeks in vain to negative the effect thereof; and a second divorce by the second expression).

So also if he says, "Thou art divorced once, not but (*la bul*) once," (two divorces shall be caused).

So also if the man says, "Thou art divorced once, not but (*la bul*) divorced once," (two divorces shall be caused).

2447. (1547.) A man says to his wife, "Thou art divorced or nothing," the expression is void (and no divorce shall take place); and then if he says, "I cause the divorce which I said (in the aforesaid first

expression, in which the word nothing was used :)" the woman shall now be divorced (see paragraph 982).

And this is an illustration of a case where a man divorces his wife and another man says, "I cause the divorce (on my wife) of the so and so (referring to the first mentioned man) who has caused it on his wife," in which case the wife of the speaker shall be divorced.

2448. (1548.) A man says to his wife, "Thou art divorced once, not but (*la bul*) to-morrow:" the woman shall become immediately divorced once; and when the morning of the next day dawns and the woman is in her *Iddut*, another divorce shall be caused.

2449. (1549.) A man says to his wife, "Thou art divorced thrice, except a moiety of it (*i.e.*, of one divorce or *Tulkut*):" two divorces shall be caused (according to the view of Aboo Yusoof, because to subtract a moiety from three means to subtract one from three, a fraction, according to him, being equivalent to the full number both in the matter of causing divorce and also in the matter of excepting divorce; therefore one being subtracted from three there remains two; see Vol. II, Rudd-ool Moohtar, page 847, where it is laid down that where a man says, "Thou art divorced thrice except a moiety of one divorce," three divorces shall be caused according to the approved view, but two divorces shall be caused according to the Sany, *i.e.*, Aboo Yusoof; because, says the Rudd-ool Moohtar, a divorce cannot be divided into fractions in causing it, so also it shall not be divided into fractions in the exception; so that the husband shall be taken to mean, "except one.") But if he says, "Except a moiety of each," then three divorces shall be caused (according to all the authorities; because, according to Aboo Yusoof, either the expression means excepting three when there is an exception of a thing from itself, and the exception is invalid, or it means the causing of three moieties of divorce which means three divorces; whilst according to Aboo Haneefa, the exception of a fraction vitiates the exception).

2450. (1550.) A man says to his wife, "Thou art divorced, if thou never had a father" or says, "if thou never had a sister," or says, "if verily I do not love thee:" this amounts to an exception, and the woman shall not be divorced in any way.

2451. (1551.) What renders an exception void consists of five things; one of which is when the thing excepted is larger than the thing from which it is excepted; as for instance, if you were to say, "Thou art divorced

thrice, except four," and in this case, the exception is not valid; *secondly*,—when a fraction of a divorce is excepted; for instance, if you were to say, "Thou art divorced except half of it," in which case the woman shall become divorced once; *thirdly*,—when the thing excepted is similar to the thing from which it is excepted; as for instance, if you were to say, "Thou art divorced thrice except thrice;" *fourthly*,—pausing otherwise than for the purpose of taking breath or on account of sneezing and the like, when the pause is made without any necessity, although the pause might be for a short period (that is, pause even for a short period without any necessity invalidates the exception, but pause does not invalidate it when it is made to take breath or to sneeze, &c.), and, according to some of the traditions, when the man's pause is for a period equal to that occupied in taking breath, although he could have avoided the pause, the pause shall not invalidate the exception (but the exception shall be considered valid and as having been pronounced in immediate succession, without any break); *fifthly*,—that expression which renders part of the exception valid and renders a part void; just as if you were to say, "Thou art divorced twice and twice except three" (here the three cannot be excepted either from the first two or from the second two, and therefore it is necessary to take one and a half from the first two and one and a half from the second two, but you can take out one from each of the two and cannot take out the fraction from each, and, therefore, the exception shall be wholly void).

God knows best.

CASES WHERE DIVORCE IS MADE DEPENDENT ON MARRIAGE.

2452. (1552.) A man says, "If I do so and so then my wife is divorced," he having no wife at the time; he then marries a wife, and afterwards does the act (which he had sworn not to do): he shall not commit a breach of his oath (because it is necessary, when taking an oath making the divorce of a woman dependent on something, that she should be then, that is, at the time of the oath, in the man's ownership by marriage, or the condition itself must be the cause of ownership by marriage, that is to say, the condition must be marriage itself).

2453. (1553.) And if a man says, "If I marry a woman or order (or authorise) a person to give me in marriage to a woman, then the woman is divorced;" he then orders some person to give him in marriage

to a woman, and the person so ordered does as he is bid: the wife of the swearer shall not become divorced, inasmuch as the man commits a breach of his oath by giving the order, but the breach does not lead to the effect contemplated in the oath (because the oath was "If I order a marriage, then the woman is divorced:" therefore the divorce is the effect of the order itself, so that as soon as the order is given, a breach of the oath takes place, but this breach does not lead to the divorce, because there is no oath in existence at the time of the marriage, which takes place after the oath; and the other portion of the oath becomes ineffectual, because the oath being in the alternative, the order satisfies the oath).

And this is an illustration of what is reported from Aboo Yusoof, on whom be peace, that, if a man says, "If I marry such and such a woman or make proposals for her marriage, then she is divorced," he then makes proposals for marrying a woman, and marries her, he shall not commit a breach of his oath; because the breach of oath was committed by the proposal to marry the woman (and, therefore, there shall be no fresh breach as a consequence of the marriage; and although there was a breach of oath as the effect of the proposal, the consequence of the breach is not secured, because the condition was a thing different from marriage, and the other part of the oath leads to no consequence for reasons already stated).

2454. (1554.) When a man says to an unknown woman or to one who was his wife, but has been divorced by him completely, and, therefore, has become completely separated (*bain*) from him, "If I make proposals to thee," or says, "propose to thee," or says, "if I wish to propose," or says, "if I wish (thee)," "divorce on thee;" he then marries her: the learned lawyers have said that his wife shall not become divorced; because the man commits a breach of his oath by his intention to marry before marriage; he shall not, therefore, commit a breach of his oath by marriage.

Moulana (Kazee Khan, the author of these Futawa) on whom be peace, says, that this answer is clear when (after having taken the oath as aforesaid) the man, before (actual) marriage, says, "I desire to propose to such and such a woman" (in which event, the case comes exactly within the oath, the intention to marry having found expression in words, although no divorce would be the result inasmuch as the condition

is an event different from marriage); but if he does not say so (that is, if he does not say before actual marriage "I desire to propose to such and such a woman), and if his oath has been expressed in the words, "If I wish thee," or "wish to propose to thee," (as in the oath at the beginning of the first portion of paragraph 1554) then this answer is difficult of comprehension; because intention is a mere act of the mind just as one's wish (*Musheeut*) and consent (*Reza, i.e.*, acquiescence), and, therefore, the man shall not be held responsible (for what passes in his mind) until he gives expression to that intention.

2455. (1555.) A man says, "If they give me such and such a woman for my wife, divorce to her:" the learned lawyers have said that this oath is not correct, so that if he (himself) marries, he shall not commit a breach of his oath (and the oath is not binding, because, in order to make the oath binding, it must relate to a marriage to be contracted by himself and not by others): and Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says, that this oath is correct, and the woman shall become divorced (because when the man says, "If people marry me to so and so" means "If it so happens that I should marry her)."

2456. (1556.) So also if a man says to his parents, "If you both shall give me in marriage to a woman, then she is divorced; they then give the man (their son) in marriage to a woman by his order: the learned lawyers have said that this oath is not correct, and the woman shall not become divorced. And Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, says, that this oath is correct, and the woman shall become divorced: and this view is correct; because the act of giving one in marriage is not completed without the swearer marrying (the woman).

2457. (1557.) And if a man says, (in Persian), "If they give the daughter of so and so to me, divorce to her;" they then give her in marriage (to this man): she shall not become divorced. But if he says, "If they give (the daughter of so and so) to me *for my wife*;" then she shall become divorced.

2458. (1558.) And if a man says (in Persian), "If such and such a woman is given to me for my wife," (without saying "and if I marry her"): the learned lawyers have said that this oath is not correct.

Moulana (Kazee Khan, the author of these Futawa), on whom be peace, says, that it is fit that the oath should be correct (and binding)

according to the view of Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace.

2459. (1559.) And if a man says, "If I take such and such a woman as my wife, divorce to her;" he then marries her: the woman shall become divorced.

2460. (1560.) And if a man says to his married wife, "If I marry thee," or says (in Persian), "if I take thee as my wife," this relates to (future) marriage (that is, the woman being already married, the word *Tuzuwwooj* or "marry" in the oath shall not be supposed to signify any other or secondary meaning, such as sexual intercourse, but it shall be restricted and confined to its own primary and literal meaning, so that the divorce shall only take place if the man happens to divorce her and then marries her again).

2461. (1561.) So also if he says (in Persian), "If I marry thee (*i.e.*, make *nikah* with thee):" this oath shall relate to the marriage (and not to its secondary meaning of sexual intercourse), and this is the correct view.

And if he says in Arabic, "If I make *nikah* with thee (then thou art divorced):" the oath shall relate to sexual intercourse (because *nikah* primarily means sexual intercourse).

2462. (1562.) And if a man says (in Persian) to a woman whom he has divorced by a revocable (*Rujue*) divorce, "If I take thee as my wife," this shall relate to marriage; and if he intends (by the words, "If I take thee as my wife") to mean revocation of the divorce (the words being susceptible of that meaning) his intention shall be correct (and valid and operative); but in the absence of any intention, the oath shall relate to marriage, (because the words ordinarily mean marriage).

2463. (1563.) A *Fuzoolee* (volunteer) gives a man in marriage to a woman; the man then (before ratification) takes oath that he will not marry a woman; the swearer then ratifies (or permits) the marriage which the *Fuzoolee* (or volunteer) had contracted before the oath: the man shall not commit a breach of his oath; because ratification (or permission) is not marrying.

And if the man takes the oath before the *Fuzoolee* (or volunteer) gives him in marriage, saying, "I will not marry a woman (and if I do so she is divorced)" and afterwards the *Fuzoolee* gives him in marriage to a woman, and the swearer ratifies the marriage (contracted) by the *Fuzoolee* by express

words, he shall commit a breach of his oath: (because ratification relates to the marriage at the time it was contracted by the *Fuzoolee*, and in this case such time was after the oath); but if the man ratifies the marriage by acts such as sending the dower or such like things, the learned lawyers have differed in this matter: and most of the Mashaikhs are of opinion that the man shall not commit a breach of his oath.

2464. (1564.) And if a man appoints another man his Vakeel, for the purpose that the Vakeel should give the man in marriage to a woman; the man then takes oath that he will not marry, (saying "if I marry a woman then she is divorced;") and the Vakeel gives the man in marriage to a woman: the man shall commit a breach of his oath; because the contract made by the Vakeel relates to the client as (if the contract had been effected by) the words of the client, and, therefore, the man shall commit a breach of his oath, just as if a man were to ratify by express words the marriage contract by the *Fuzoolee* (as in paragraph 1563 second case).

2465. (1565.) And if a virgin (*i.e.*, one not already married), swears that she will not give her person in marriage (that is, not marry at all), and her guardian gives her in marriage; and she keeps quiet (on the information being conveyed to her): it is reported from Mahomed on whom be peace, that he (Mahomed) has said that she shall commit a breach of her oath, and that he (Mahomed) has rendered her permission (or ratification) by acts as a breach.

2466. (1566.) A man swears that he will not marry a woman; he then marries a woman by an invalid marriage: it is stated in the work called the Kitab, that he shall not commit a breach of his oath: the learned lawyers have said that this is the view of Aboo Yusoof and Mahomed, on whom be peace; but that, according to the view of Aboo Haneefa, on whom be peace, the man shall commit breach of his oath: but the correct view is that laid down in the Kitab (of Mahomed).

2467. (1567.) A man says, "Every woman whom I shall marry, is divorced," intending thereby to refer to the women of such and such a place, or intending thereby to refer to Negro women or other (particular) women: the man shall not be believed by the Kazee according to the Zahir-i-Rawayet.

2468. (1568.) And if a man says, "Every woman whom I shall ever (or for all time to come) marry" or says, "whom I shall marry for

thirty years, is divorced, if I speak to so and so;" and he then marries a woman, before speaking (to the so and so), and marries another after that (that is, after speaking to the so and so): every woman whom he marries, during that time, shall become divorced.

But if his oath has no reference to time, as for instance when he says, "Every woman whom I shall marry is divorced if I speak to so and so," and he marries one woman before speaking to the so and so and marries another woman after speaking to the so and so, then she whom he has married before speaking to the so and so, shall become divorced, but the woman whom he marries after speaking to the so and so shall not become divorced.

And verily has this case been discussed before. See paragraphs 1452, 1453 and 1454.

2469. (1569.) And if a man says, "If I speak to so and so, then every woman whom I shall marry, is divorced:" then divorce shall not be caused on the woman whom he marries before speaking to the so and so, whether the oath is an absolute one (that is, without reference to time) or one which has reference to time.

And if he intends that divorce should be caused on the woman whom he marries before speaking to the so and so, his intention shall be correct (or valid and operative); because speaking to the so and so admits of taking place before and after the marriage; and, therefore, divorce shall be caused on the woman whom he had married before speaking to the so and so by virtue of his intention, and divorce shall be caused on the woman whom he marries after speaking to the so and so by virtue of the obvious meaning of the words used (in the oath): and therefore divorce shall be caused on both of them.

2470. (1570.) A man says, "Whichever woman I shall marry is divorced:" the oath shall relate to one woman (only) unless the man intends all women (that is, women generally).

2471. (1571.) And if the man says in Persian, "Whatever woman I shall take as wife, divorce on her:" this shall apply to every woman whom he shall marry.

And some of the learned lawyers have said that (in this case) the divorce shall not be caused except on one woman, and they have rendered the same as the Persian version of the expression (in Arabic), "Whichever woman I shall marry."

But the correct view is that first stated.

2472. (1572.) And if a man says in Persian, "Every woman whatsoever, that comes in my marriage (is divorced):" it is fit that this oath shall apply to every woman whom he shall marry, according to the view of them all (*i.e.*, Aboo Haneefa and his two disciples); because the man renders "marriage" as the quality of "woman," and, therefore, the "woman" shall be understood in the sense of universality (*Oomoom*) on account of the universality (*Oomoom*) of the quality (*wusf*).

And if he says (in Persian), "Whichever I shall marry (shall be divorced):" then the oath shall refer to every woman once, unless he intends thereby a repetition of divorce on the same woman (on the occasion of fresh marriage with her).

2473. (1573.) And if the man says (in Persian), "Every time that I shall marry a woman:" this oath shall include every woman, and the divorce shall be repeated on every woman by the repetition of marriage (with the self-same woman).

2474. (1574.) And if a man says (in Persian), "At whatever time that I shall (marry or) take woman (she shall) be divorced:" this oath shall apply only to one woman and not to any other (and after one marriage the oath exhausts itself).

2475. (1575.) And if a man says (in Persian), "If I desire such and such a woman" or says, "Every woman that I desire:" then if this is said at a place where people imply by the expression ("I desire,") a marriage, divorce shall be caused: but if this is said at a place where people imply proposal (or overture) by the expression, then the oath shall not be correct (that is, valid and operative) and divorce shall not be caused in the event of marriage taking place.

And according to our idiom, this word (desire) means marriage and not proposal (or overture).

2476. (1576.) A man says in Persian, "If, besides thee, I take a woman (that is, marry)" or says, "If, besides thee, I have a woman (that is, a wife) then she is divorced" or says, "then she is a thousand times divorced;" he then marries a woman besides her, and he afterwards marries another (that is, a third woman): the woman whom he marries first (after his oath) shall become divorced and not the woman whom he marries (after the oath); because the man's expression "woman" includes only one woman.

2477. (1577.) And if he says (in Persian), "If to me there be in

this world a woman (that is, a wife), then she is thrice divorced;" he then marries a woman: she shall become divorced: and if he marries another woman, she shall not become divorced, for the reason already stated (in the previous paragraph) that this word (that is, "woman") does not include except one woman (that is, it applies only to one woman).

2478. (1578.) A woman says to an unknown man, "I have given myself in marriage to thee;" the man says "then thou art divorced:" the woman shall become divorced: but if he says, "thou art divorced" (without using the word "then") she shall not become divorced, and this latter expression (that is, "thou art divorced") shall not imply an acceptance of the marriage, because this expression is by way of information. But in the first case (that is, where the man says "then thou art divorced" the word *then* implies acceptance of the proposal of the marriage which emanated from the woman and) the husband renders her divorce as the effect of her marriage; and her divorce cannot be regarded as the effect of her marriage unless the man has accepted the proposal of marriage; and therefore the man's expression (that is, the words, "then thou art divorced") becomes an acceptance of the marriage, and consequently the divorce is caused afterwards (that is, the man, in effect, says, "If thou give thy person in marriage to me, I have accepted the marriage and divorced thee").

2479. (1579.) A man says "Every woman whom I shall ever marry in (*i. e.* within) such and such a village, is divorced;" he then takes out a woman from that village and marries her: the woman shall not become divorced, because the man has not married her in that village. So also if he does not take her out of that village, but marries her in a village other than that village, (by means of a vakeel for instance) he shall not commit a breach of his oath; because the condition for the breach of the oath is the marrying her in that village.

2480. (1580.) And if a man says, "Every woman whom I shall marry from such and such a village (is divorced);" he then marries a woman from that village (that is, belonging to that village): the man shall commit a breach of his oath wherever he might marry her.

2481. (1581.) A man says "Every woman I shall have (as a wife) at Bokhara (that is, every woman whom I shall marry at Bokhara) is divorced;" he then marries a woman at Bokhara; she shall become divorced: but if he marries the woman at a place different from Bokhara

and then takes her to Bokhara, then the Mashaikhs, on whom be peace, have differed in this matter: some of them have held that the woman shall become divorced (having construed the oath to mean whatever wife of mine shall reside at Bokhara); whilst others have held that she shall not become divorced: and this view is correct; because, according to ordinary parlance (*oorf*), the words imply the taking place of marriage at Bokhara.

2482. (1582.) A man says, "If I marry a woman from the daughters of so and so, then she is divorced," the fact being that at the time of the oath, the so and so has no daughter, but he gets a daughter born afterwards, and the swearer marries such a daughter: the learned lawyers have said that the man shall not commit a breach of his oath, and the condition (for the validity of the oath) is, that the daughter should be in existence at the time of the oath, and what comes into existence (*haadis*) after the oath, shall not be included in the oath; just as if a man swears that he will not marry any of the residents of "this" house, the fact being that there is no resident in that house but afterwards some people come to live in that house, and the swearer marries a woman from amongst such people, the man shall not commit a breach of his oath, and the existence of residents in that house is a condition (for the validity of the oath) at the time of the oath. And this view is in accordance with that held by Mahomed, on whom be peace.

But by inference (*Kyas*) from the sayings of Aboo Haneefa and Aboo Yusoof, on whom be peace, what is in existence at the time of the oath as well as what comes into existence afterwards, are both included in the oath; just as if a man swears that he will not speak to the son of so and so who has no son (at the time of the oath), but who gets a son afterwards, and the swearer speaks to that son, he shall commit a breach of his oath according to the view of Aboo Haneefa and Aboo Yusoof, on whom be peace, but he shall not commit a breach of his oath according to that of Mahomed, on whom be peace.

2483. (1583.) And if a man says "By God I shall not marry a woman from amongst the residents of Koofa; he then marries a woman from amongst the residents of Koofa, such woman having been born after the oath: the man shall commit a breach of his oath (according to all three).

Mahomed, on whom be peace, makes a difference between this case and between the case (stated in 1582) relating to the "daughter of so

and so;" because (says Mahomed) the residents of Koofa constitute a tribe (*Koum*), who cannot be counted, and therefore (in the case of the residents of Koofa) the incentive to the oath is not anger on account of the swearer's rights in reference to the residents (of Koofa) but on the other hand the incentive to the oath relates to the place of Koofa itself, and, therefore, those that are in existence (in Koofa) at the time of the oath as well as those who come into being afterwards, are both included in the oath: on the contrary in the case of "the daughter of so and so," there the incentive to the oath is the swearer's anger on account of his rights in reference to the daughters of so and so, and therefore those (of the so and so's daughters) who are in existence shall be included in the oath, and not those who come into being afterwards.

2484. (1584.) And if a man swears that he will not marry, "out of (or from amongst) the women of Busora;" he then marries a girl who is born at Busora, who is brought up at Koofa and is domiciled (*watun*) there: the swearer shall commit a breach of his oath according to Aboo Huneefa on whom be peace; because what is to be regarded according to him in this matter is birth.

2485. (1585.) A man swears (in Persian) that he will not marry "out of (or from amongst) the descendants (*Nuzad* or lineage) of so and so;" he then marries the so and so's daughter's daughter: the learned lawyers have said that the man shall commit a breach of his oath; because this word descendant (*Nuzad*) in ordinary parlance includes the daughter's daughter just as it includes son's daughter.

2486. (1586.) And if a man swears that he will not marry "out of (or from amongst) the residents (*ahl-i-bait*) of the house of so and so;" and he marries the so and so's daughter's daughter: he shall not commit a breach of his oath; because this expression (*ahl-i-bait*) does not include the daughter's children.

2487. (1587.) A man says "If I marry a woman as long as (*ma doomto*) I am in Koofa, then she is divorced;" he then leaves Koofa but returns to it again, and marries a woman (there): the woman shall not become divorced; because his oath was confined as regards time, as long as he was to be in Koofa, and when he left Koofa his oath came to an end. But if he leaves Koofa himself alone, but his domicile (*watun*) remains there, even in that case, he shall not commit a breach of his oath unless he intends permanency of his domicile at Koofa (that is, if his intention is to take oath not to marry as long as his domicile remains at Koofa, then if he

leaves Koofa and marries elsewhere, he shall still commit a breach of his oath).

2488. (1588.) A man says to his parents, "If I marry a woman as long as you both are alive, then she is divorced;" he then marries a woman whilst they are alive: she shall become divorced; but if he marries another woman in their lifetime, this second woman shall not become divorced, for the reason stated by us that his expression "woman" applies only to one woman. (See paragraphs 1576 and 1577).

2489. (1589.) And if a man says to his parents, "Every woman whom I shall marry as long as (*ma doomtooma*) you both are alive" or says in Persian, "Every woman whom I shall desire (as wife, &c.):" then every woman whom he shall marry during their life shall become divorced.

And if one of the two parents dies, then, if his intention was not to marry during the life of one of them, the result will be according to his intention: so also if his intention was not to marry during the lives of both of them, the result will be according to his intention: but if he had no (particular) intention, it is fit that his oath shall not continue in force after the death of either of them, just as if a man swears that he will not speak to the brothers of so and so, in which case if he speaks to one of the brothers, he shall not commit a breach of his oath.

2490. (1590.) A man swears he will "not marry a woman;" he then marries an infant girl: he shall commit a breach of his oath; but if he swears that he will not speak to a woman, and speaks to an infant girl, he shall not commit a breach of his oath.

2491. (1591.) A man says, "If I marry a woman who had a husband, then she is divorced;" he then divorces completely (*bain*) his own wife (*viz.*, the wife he already had at the time of his oath) and then marries her again: the woman shall not become divorced; because the incentive to the oath was the anger of the swearer on account of (*i.e.*, towards) the woman's husband, and, therefore, the oath shall relate to somebody beside himself.

2492. (1592.) So also if the man swears that he "will not have sexual intercourse with a woman, with whom a man has had sexual intercourse:" it will still be open to him to have sexual intercourse with his wives and female slaves.

2493. (1593.) A man swears that he "will verily marry in concealment;" he then marries a woman, the marriage being attested by two witnesses: this marriage shall be one of concealment; because a marriage is not capable of being contracted without two witnesses; and therefore, the marriage, which is attested by two witnesses, is not held to be attended with publicity. Therefore if the man marries, so that the marriage is attested by three male witnesses, then the man shall commit a breach of his oath.

2494. (1594.) A man says to two women, "If I propose to you two (that is, make overtures of marriage to you) or marry you two, then you two are divorced;" he then proposes to both, and then marries both: the man shall not commit a breach of his oath, for the reason stated by me as regards the case of a single woman, and the same rule applies to the case of two women. (See 2nd part of paragraph 1553).

2495. (1595.) A man knows (to a certainty) that he has taken oath for the divorce of every woman whom he was to marry (that is, he remembers to have taken an oath thus—"Every woman whom I marry, is divorced"), but he does not remember whether at the time he took the oath, he was of age or not; he then marries a woman: he shall not commit a breach of his oath; because he doubts the correctness (or validity) of the oath, and he shall, therefore, not commit a breach of his oath on account of this doubt.

2496. (1596.) A man says, "If I marry a woman up to (*Ila*) five years, then she is divorced;" he then marries in the fifth year: the woman shall become divorced; because his oath does not come to an end before the expiration of the fifth year. Dost thou not see that if a person gives a lease of his house up to (*Ila*) five years, then the fifth year shall be included in the lease.

2497. (1597.) A man says "If I eat of the bread of my father, until I have married Fatima, (*i. e.*, before I have married Fatima) then every woman whom I shall marry, is divorced;" he then eats of the bread (of his father) and then marries Fatima, she shall become divorced; because when he eats of the bread before marrying Fatima, (*i. e.*, when the condition comes to be fulfilled) then he (in effect) says at the time of the eating "Every woman whom I marry, is divorced" and, therefore, when he marries Fatima after the eating, Fatima shall become divorced.

2498. (1598.) But if he says, "Every woman whom I shall marry,

as long as I have not married Fatima, is divorced;" then Fatima dies, or absents herself (*i. e.*, disappears); and the man then marries another woman: this woman (so married) shall become divorced in the event of Fatima having disappeared, but she shall not become divorced in the event of Fatima's death; because, in the case of Fatima having disappeared, the man marries a woman different from Fatima, during the subsistence of his vow, and therefore the man shall commit a breach of his oath; but in the case of Fatima's death, the man shall not commit a breach of his oath according to Aboo Haneefa and Mahomed, on whom be peace, because according to them, the man's oath becomes void by the death of Fatima (because possibility of *Birr* or fulfilment is removed by death) and he shall, therefore, not commit a breach of his oath after this (*i. e.*, after the possibility of fulfilment has passed away).

2499. (1599.) A man says, "If I marry such and such a woman, then she is divorced;" then a *Fuzoolee* (or volunteer) gives that woman in marriage to the man without her permission (that is, the *Fuzoolee* acts in reference to the woman); she then ratifies the marriage after this: the woman shall become divorced. Some of the learned lawyers have held that it is fit that the woman shall not become divorced; because the man commits a breach of his oath by the marriage contracted by the *Fuzoolee*, and the woman is not under his marriage before she ratifies the marriage, because the husband commits a breach of oath by the contract made by the *Fuzoolee*; but the woman does not come under the *Nikah* of the husband, before she ratifies the marriage; therefore the oath exhausts itself without there being any consequence, and, therefore, the woman shall not be divorced.

But the correct view is, that the woman shall become divorced; because the marriage by the *Fuzoolee* was not concluded before ratification (and, therefore, when she ratifies the marriage, then the marriage takes place, and the consequence of the oath is realised), and therefore there is no breach of oath before the ratification.

And, therefore, if the man takes an oath that he will not marry (at all) and then he marries a woman, who is given in marriage to him by a *Fuzoolee* (acting in reference to the woman), the man shall not commit a breach of his oath before the marriage is ratified by the woman. (See paragraph 1563.)

2500. (1600.) A man swears that he will not marry such and such a woman, or swears that he will not marry any woman; he then marries

a woman by way of an invalid marriage and then separates from her, and then marries her by way of a valid marriage: he shall commit a breach of his oath; because he committed no breach of his oath by the invalid marriage (because the invalid marriage was no marriage at all) but he commits a breach of his oath by the valid marriage. (See paragraph 1566.)

2501. (1601.) A man swears that he will not marry any woman; he then becomes insane, and his father gives him in marriage to a woman: the swearer shall commit no breach of his oath (because it was his father who gave him in marriage; and although marriages by a father of his adult son are dependent on the ratification by that son, here the marriage will be valid without the son's ratification, he being incapable of such ratification either by express words or by his acts, and, therefore, the marriage must be held to have been contracted by the father); on the contrary (see paragraph 1564) in the case of a man who appoints another man his Vakeel for the purpose of giving the former in marriage, and who afterwards swears that he will not marry, if the Vakeel afterwards gives the man in marriage to a woman, the man shall commit a breach of his oath (because the Vakeel's acts are the man's own acts, and he ought to have gone and prohibited the Vakeel from acting on his behalf any further).

2502. (1602.) A man says (in Persian), "If I give my daughter to anybody for his wife, or allow that they (*i.e.*, other people) should give her to anybody, then he (the man himself) is bound to do so and so (*e.g.*, to free a slave);" then the device in this matter is, that the daughter should appoint a man as her Vakeel to give her in marriage, if she is of age, and the Vakeel should give her in marriage, and the father should say, "I do not permit what they have done;" thus the marriage shall be valid, (because a woman of age can give herself in marriage) and the father shall not commit a breach of his oath, (because he has acted within his oath).

2503. (1603.) A man swears that he will not give his minor daughter in marriage (to anybody); a Fuzoolee then gives her in marriage, and the father ratifies the marriage by his acts: he shall commit no breach of his oath; just as if a man swears that he will not sell (a thing) and somebody else sells the thing without his order (or authority) and the swearer receives possession of the consideration (*sumun*); when the swearer shall not commit a breach of his oath.

2504. (1604.) A man says to his wife, "Every woman whom I shall marry, verily have I sold her divorce to thee for one dirhem;" he then marries a woman, then the wife who was with the man (that is, his first wife for whose satisfaction the oath was taken) says, when she comes to know of the *Nikah* made by the husband with the other woman, "I have accepted (the purchase of the *Talak*)" or says, "I have divorced her" (*i.e.*, "I have accepted the purchase and I have divorced her") or says, "I have purchased her (that is, the new wife's) divorce:" then the woman (newly) married by the husband shall become divorced.

And if the woman who was with the man already, (*i.e.*, his first wife) says, before the husband marries the second wife, "I have accepted (the purchase of the divorce)," then her acceptance shall not be valid; because this amounts to acceptance before any proposal was made (because the oath means, "If I marry a woman, then I sell her *Talak* to thee for a dirhem;" here there is no proposal to sell at all before he marries, and when he marries, then it must be held by a fiction of law that a proposal comes from him to the effect, "I sell the *Talak* to thee;" and if the first wife then says, "I have accepted," this is a true sale; and if the first wife says, "I have accepted" before the husband's second marriage, then there cannot be a sale, because acceptance has been found without a proposal of sale).

2505. (1605.) A man says (in Persian), "Every woman he might have (as wife) for thirty years, she should be divorced from him;" intending thereby that the oath shall apply to a woman he might acquire (as wife) after the oath (and not to his present wife); or he had no (particular) intention: then the wife, who is with him at the time of the oath, shall not become divorced; because, according to ordinary parlance, this (that is, the expression used in the oath) refers to the woman whom the man may acquire (as wife) after the oath.

The lawyer, Aboo Leith, on whom be peace, says, that the man's expression (in Arabic), "Every woman who may be for me" (which is the Arabic rendering of the expression used in the oath) is equivalent to his expression (in Arabic), "Every woman whom I may marry."

But if the man intends (by the expression used) to include in his oath, the woman who is already in his marriage as well as the woman whom he might marry after the oath during the aforesaid time, then his intention shall be correct; because he intends to include the woman who

might be in his marriage at the time of the condition, if the oath is dependent (or conditioned as regards time).

But if he intends his oath to apply to his present wife and not to the wife whom he might acquire after the oath, then the present wife shall be included in his oath by the effect of his intention, and the woman whom he might marry afterwards shall be included in the oath by the force of express words used; because the expression used apparently applies to the woman whom the man might acquire afterwards (as his wife), and therefore it is not competent to the man to take away the application of the oath to her whom he might afterwards acquire (as his wife).

So also if the man says, "Every woman he might have (as his wife)," without specifying any time, (the effect of this oath is the same as the above).

2506. (1606.) And if a man says (in Persian), "Every woman he might have (as wife) or may have (as wife):" then our Mashaikhs and those of Balkh, on whom be peace, have said that this expression and that used in the above case (that is, in the previous paragraph) are equivalent (in regard to the several ways in which the case might be looked at); because his expression "and may have" (*bashud*) is intended to reiterate the meaning of the first expression used (*viz.*, might have—*boowud*) and therefore that (second) expression (*bashud*) shall not have the effect of altering the meaning of the first expression (as might be supposed by regarding it as a surplusage causing a break between the conditional expression and its effect).

But the Mashaikhs of Samarkand, on whom be peace, say that this oath is not validly contracted, because the second expression (*bashud*) only expresses the same meaning as the first expression (*boowud*), and therefore the second expression is a surplusage, and it constitutes an interruption between the first expression (*boowud*) and its consequence (or effect, that is *Juza, viz.*, "thou art divorced;") and therefore it is fit that the oath shall not be held to be valid, according to the view of Aboo Haneefa, on whom be peace; just as if a man says to his slave, "Thou art free, and free, if it pleases God," or says to his wife, "Thou art divorced thrice and thrice, if it pleases God," in which case the repeated word becomes an interruption between the exception (that is, the expression "if it pleases God") and between the first word (that is, the word "free" or "thrice," first used), and the exception shall not be valid, and divorce or freedom shall be immediately caused.

But the correct view is that taken by our Mashaikhs, on whom be peace; because it is necessary to assign a meaning to the expression, as far as this may be possible; and it is possible to assign a meaning to the expression (instead of the whole being rendered without effect) by considering the second word used as a repetition of what is denoted by the first word; but if it be assumed (that is, if the second word be assumed) as surplusage, then it is not correct that every surplusage should be regarded in the light of an interruption: dost thou not see that if a man says to his wife, who is present (before him), "Thou art divorced, oh such and such a woman (calling her by her name), if thou shalt enter the house," the oath is valid, and calling her (by saying "oh such and such a woman,") is not considered as an interruption.

2507. (1607.) And if a man says (in Persian), "Every woman whom he might desire (*Khahud* i.e., marry—see paragraph 1575) and whom he might have (*boowud*) and who may be (*bashud*), as his wife, is divorced, if he does not do such and such an act:" the learned lawyers have said that one of the three words used must be considered as surplusage (because a repetition or *Takeed* is made by the use of a second word) and shall be a surplusage, and shall constitute an interruption, according to all; but this will be the result (*viz.*, one of the three words used must be considered an interruption) if the man does not intend by one of the last two words used, his present wife; but if he does so intend, it is proper that his intention should be correct (as not being inconsistent with the words used) and that his oath should also be valid (because then the first word would imply a future wife, and the second word would imply *Takeed*, or repetition of the first word, and the third word would apply to the present wife).

2508. (1608.) And in a place where it is valid to make divorce dependent on marriage, if the man wishes to marry a woman and that she might (still) not be divorced (that is, if he wishes to avoid the consequence of his oath, and get out of it), then (the device is that) he has two courses open to him. One of them is that a Fuzoolee should give the man in marriage to a woman, and the man should ratify the marriage; and the second is to have the oath rendered void: (see paragraph 1614 *post*). The first course, in our time, is preferential, and this is quite clear (because Aboo Haneefa does not recognise the process to avoid the oath; Shafei alone recognises it); and if the swearer intends that some Fuzoolee should give him in marriage, then the man must go to one learned in law (*Alim*) and

say to him (in Persian), "I have sworn in this matter in this way (setting forth his oath), and I am in need of my marriage being contracted by a Fuzoolee." The lawyer (to whom these words have been addressed and who has not been made his Vakeel, but who knows his meaning) should give him in marriage to a woman, and the man should ratify the marriage by acts (*e. g.*, sending her the dower); the man shall not commit a breach of his oath.

So also if the man were to say to a number of people assembled (*Jumaut*), "I am in need of getting married by a Fuzoolee," and one of those present gives him in marriage to a woman, and the swearer ratifies the marriage by his acts (he shall not commit a breach of his oath, and the Fuzoolee shall not be the man's Vakeel).

2509. (1609.) So also if a man says (in Persian) to a number of people assembled (*Jumaut*), "I am in want of a man who should desire a woman for me (that is, who should give me in marriage to a woman)," it is permissible for him to say so, and this shall not amount to authorising any person as Vakeel, because to make an unknown man Vakeel is void.

2510. (1610.) And if a man says to another man (in particular), "Do contract a Fuzoolee marriage for me:" the learned lawyers have held that this amounts to making that other man a Vakeel; and if the man so directed gives him in marriage, then the man (the speaker) shall commit a breach of his oath.

2511. (1611.) And if the swearer intends (or is desirous) to ratify by acts the marriage contracted by the Fuzoolee, he shall ratify the same by sending the dower, and not by kissing and not by touching (because these are acts which are lawful after the marriage has been ratified, and the ratification must, therefore, be by other acts; but if the ratification is done by kissing and touching, the ratification shall be complete, but the kissing and touching would involve sin, as having been found before the marriage became operative) in order that the first act (between the husband and the wife) might not be found before the marriage has become operative; and if he sends her a present or a gift, this shall not amount to ratification (because presents are made to strangers also; there should, therefore, be something which is peculiar to the relationship of husband and wife); so that if the man ratifies the marriage by words after this (that is, after he has sent presents or made a gift), the woman

shall become divorced (as the consequence of his oath referred to in paragraph 1608).

And if the man sends to the woman (to whom a Fuzoolee has given him in marriage) her dower, and he afterwards ratifies the marriage by words, the woman shall not become divorced.

Because the sending of presents and making of gifts, is not a thing specially relating to marriage relation or to its effect, and therefore the same shall not amount to ratification: but the sending of dower, on the contrary (shall amount to ratification).

2512. (1612.) And if a man says (in Persian) to one whom he has divorced by (*bain* or) complete divorce, or to an unknown woman, "If any person takes thee as wife, and makes a gift of thee to me, then thou art divorced:" this oath shall be void because he does not refer the divorce to the cause of ownership (that is, marriage with himself) and therefore the oath shall not be valid.

2513. (1613.) And if a man says, "Every woman who shall enter in my marriage (that is, whom I shall myself marry), is divorced;" and a Fuzoolee gives him in marriage, and the swearer ratifies the marriage by his acts: the learned lawyers have said that this expression and the expression, "Every woman whom I shall (myself) marry" are of equal effect (so that the marriage by the Fuzoolee ratified by acts is not included in the oath; and these two expressions are of equal effect for this reason namely) because there is only one cause for the woman entering in the marriage of the man, and that cause is the act of marrying, and therefore when the man mentions the effect (as he does when he says "Every woman who enters in my marriage") the result is the same as if he mentions the cause (*viz.*, the act of marrying).

And this is an illustration of the rule that when a man claims the child of a free woman (as his child), or makes an admission regarding the parentage of the child of a free woman (ascribing the parentage to himself), this shall amount to an admission of marriage with the mother (because the cause is marriage, and the effect is the establishment of parentage, or *nusub*).

2514. (1614.) Then (in continuation of paragraph 1608) as regards the way to render an oath void: if a man of the Hanifite sect says, "When I marry a woman, then she is divorced thrice;" and he then goes to the Kazee and demands of him the avoidance (or nullification) of the oath;

then if the Kazee is of the Hanifite sect, it is not proper for him to nullify the man's oath, because if he does so, he would be acting contrary to his convictions (because, according to Aboo Haneefa, an oath cannot be nullified); but it is fit for the Kazee (of the Hainfite sect), if he is vested with authority to appoint a Deputy (*Istikhlaf*), to send the swearer to a man professing the Shafei tenets (that is, to one learned in the law of the Shafei sect whether he be a Kazee or not), without making any (positive) order on the man, to whom the swearer is sent, to nullify the oath; because in the same way as it is not competent to the Kazee to make a decree contrary to his own conviction, it is likewise not proper for him to direct some other person to act contrary to what his (that is, the Kazee's) convictions are (that is, the Kazee must not himself do, or get somebody else directly to do a thing contrary to the principles of his particular sect); but the Kazee shall direct the referee (that is, the person of the Shafei sect) to hear the case of the two parties (because the case must arise after marriage, and an abstract case must not be submitted to the Kazee) and make a decree between the two parties (when it is expected, according to what has been laid down in that behalf in regard to the Kazee of the Hanifite school, that the Shafei referee shall decide according to the doctrine of his sect, by which an oath can be set aside or dissolved, though not according to the view of Aboo Haneefa).

And if after this (that is, after the swearer has demanded the dissolution of his oath), if the first or the second Kazee, takes some property (or in other words, bribe) to effect this purpose (that is, to dissolve or annul the oath), the decree for the nullification of the oath shall not be valid, according to all the authorities, and his decree shall not be operative. But if the Kazee takes wages for writing, then if he charges in excess of wages due for similar work, even then the same result follows; but if he receives (only) to the extent of wages for similar work, then this circumstance does not prevent (or affect) the validity of the setting aside of the oath: but it is preferable that the Kazee should take nothing.

And if the swearer goes to the second Kazee (*i.e.*, the Shafei referee), with the warrant (or letter) of the first Kazee, the second Kazee shall not hear the swearer's word, and he shall not nullify the oath except in the presence of his opponent: the swearer shall then produce with him the woman whom he married (contrary to his oath), and the woman shall lay claim against the swearer, that she is verily his wife, and that he verily married her for a hundred dinars, and that it is obligatory on him to pay

her dower and to conform himself to the obligations of the marriage, consisting of maintenance and residence, and other matters; and the man shall then say, "Yes, I married her for one hundred dinars, except that I made an oath, before marrying her, that 'if I marry a woman, then she is divorced,' and although I married her, still divorce was caused on her before I had sexual intercourse with her, as a consequence of my previous oath;" then, when the Kazee (of the Shafei sect) hears the pleadings of both parties, and the woman demands from the Kazee an order for the continuance of the marriage, then the Kazee shall say, "I have decreed that the oath mentioned by thee shall be void, and that the marriage shall continue between you two:" the decree so passed by the Kazee of the Shafei sect shall have effect given to it, and the woman shall become lawful to the swearer. And it is not necessary that the annulment (or avoidance) of the oath (so decreed as aforesaid by the Shafei referee) shall be adopted (or promulgated) by the Kazee (of the Hanifite sect): but if the latter adopts (or promulgates) the same, it is better.

[NOTE.—According to Shafei, the expression does not amount to an oath, because he maintains that present ownership must be found in order that the oath should be valid; therefore, according to him, if a man says to his wife, "If you enter the house you are divorced," this is a valid oath; but it is not a valid oath for him to say to a woman, "If I marry thee, then thou shalt be divorced." But according to Aboo Haneefa, both oaths are valid. In the present case, according to Shafei there is no valid oath, and therefore the marriage is valid, and the Shafei Kazee decrees accordingly. See also paragraph 742].

2515. (1615.) And if the swearer has taken several oaths with reference to the same woman, saying, in reference to her, repeatedly, "If I marry thee, then thou art divorced;" or says "As often (*Kooluma*) as I marry thee, thou art divorced;" or says "When I marry a woman, then she is divorced," repeating this (that is, the last oath) several times; then when the Kazee of the Shafei sect decrees the subsistence (or the continued validity) of the marriage of this woman, all the oaths shall be annulled (with reference to this woman) according to all the authorities.

And if he had said to a woman, "When I marry thee, then thou art divorced;" and he then says to another woman, "When I marry thee, then thou art divorced;" and he then marries one of them, and the Kazee (of the Shafei sect) annuls the oath as regards one of the women, and

decrees the subsistence of the marriage with her, this shall not amount to an annulment of the oath as regards the other woman; so that if he marries the other woman she shall become divorced according to them all.

So also if the oaths relate to many women. And if he contracts one oath in regard to several women, saying, "Every woman whom I shall marry is divorced," and if the oath is annulled in regard to one woman, (by the Shafei Kazee), the learned lawyers have regarded this as a disputed case, basing themselves on inference from a case stated in the Moontuka (which is as follows).

2516. (1616.) A man says, "Every slave whom I shall own, is free;" he then becomes the owner of a slave; the slave then establishes proof by witnesses regarding his oath, and the Kazee decrees that the man did take the oath and also decrees that the slave shall be free; the man then becomes the owner of another slave, the question is, whether the second slave is obliged to establish proof by witnesses regarding the fact that the man did take the oath: the learned lawyers have said that according to the view of Mahomed, on whom be peace, it is not necessary for the (second) slave to establish such proof; and that, according to the view of Aboo Yusoof, on whom be peace,—and that is a tradition from Aboo Haneefa, on whom be peace,—the slave shall be obliged to establish such proof.

And most of the Mashaikhs, on whom be peace, act on the view of Mahomed, on whom be peace, in cases of divorce.

And this case is just like the case where a man claims against another man, that the former is the Vakeel on behalf of so and so who is absent, in regard to all (his client's) the absentee's rights and claims against people, and that the absentee has owing from the defendant so much; and he establishes proof by witnesses to substantiate this (that is, his authority and the debt), and the Kazee decrees in favor of the man's general agency: the man shall not be obliged to prove his agency against other debtors.

2517. (1617.) A man says to a woman, "If I marry thee, then thou art divorced;" he then marries her and divorces her thrice; the woman then refers the matter to the Kazee to get the oath annulled: the Kazee shall not annul the oath; because if the Kazee were to set aside the oath, the woman would become thrice divorced by the immediate divorces caused after the marriage; and therefore the setting aside of the oath or *Yumeen* by the Kazee would not end in any result (that is, when the oath is in force,

then at the time of the marriage, one divorce is caused by the effect of the oath, and the woman, being one with whom no sexual intercourse is had, becomes completely separated, and, therefore, there is no subject on which the three divorces subsequently given could operate: but if the Kazee were to set aside the oath, then the divorce, which was contemplated by the oath, would not be caused, and the woman would remain his wife, but then the three divorces caused by the husband after the marriage, as immediate and instantaneous divorces, would be operative, and therefore, no good would result if the Kazee were to set aside the oath).

2518. (1618.) And if a man of the Hanifite sect, makes divorce dependent on an act of marrying (or marriage), and he then marries a woman, but he does not refer the matter to the Kazee (of the Hanifite sect) but makes a prayer to one of the Shafei sect, who gives a Futwa that the divorce has not been caused, it is not proper for the swearer to abide by the Futwa of the Shafei Kazee and to give up the principles of his own sect; because it is obligatory on him to abide by the view which our learned in the law, on whom be peace, take, and not by the view taken by those who follow the Shafei sect, on whom be peace, and the Futwa, given by those who follow the Shafei sect, shall be no guide for the Hanifites.

2519. (1619.) And if a woman along with a man asks another man to arbitrate for them in such a matter (that is, the matter to avoid an oath); then if the man so appointed to arbitrate is of the Hanifite sect, his order (setting aside the oath) shall not be operative; but if he is of the Shafei sect, then the learned lawyers have differed (on the question whether his order should be carried into effect): some of them have said that his order shall not be operative; because his order is equivalent to a Futwa: the correct view is, that his order shall be operative on them (so that the Kazee shall compel the parties to act up to it without himself going into the question afresh). Shums-ool Ayma Hulwai, on whom be peace, has laid down that the order of the arbitrator —in a case which (is not provided for, but which) must be inferred (by the process of reasoning called Kyas, and which case is called Moojtuhidat), such for instance as the case relating to Kinayat (or indirect expression of divorce) and the (case relating to) divorce depending on a condition and other matters,—is effective; and it is not competent to either party to resile from his order (that is, to act contrary to it) after the order has been made.

Moulana (Kazee Khan, the author of these Futawa), on whom be peace, says, that this point (*viz.*, what has been stated as a rule that the order of the Shafei arbitrator is binding in reference to Moojtuhidat questions contrary to the kyas of Aboo Haneefa) is one, which is fit to be known but not to be promulgated (and made known to others), with a view to avoid the public being emboldened to resort to the course (*viz.*, that of asking a Shafei's opinion on such matters when the principle of his own sect is unfavorable to him) and it is for this reason that the Mashaikhs have refrained from giving Futwa validating the order of an arbitrator. (See also paragraph 742.)

2520. (1620.) And if the man and wife, appoint a man arbitrator without informing him that they have appointed him to arbitrate in a particular matter, but they put forward their case before the arbitrator, and the arbitrator arbitrates between them; then, according to the view of him who allows arbitration of an arbitrator at all, this arbitration (of the arbitrator, who was appointed to arbitrate in a matter which was disclosed only in the statement of the case and not at the time of the appointment) shall be valid; because it is valid to appoint an arbitrator without his knowledge (of his having been appointed arbitrator).

2521. (1621.) And if a swearer (who had taken oath that "if I marry a woman, then she is divorced") marries a woman, and the swearer does not refer the matter to the Kazee (*i.e.*, does not ask the Kazee to release him from his oath) so that the woman (disregarding the first marriage), marries another husband without the knowledge of the first husband, and then they (that is, the swearer and the woman married by him) refer the matter to the (Shafei) Kazee (that is, ask the Kazee to set aside the oath) and both of them state their case to the Kazee, and the Kazee makes an order nullifying the oath and that the divorce (involved in the oath) has not been caused, the Kazee's order shall not be operative; because the marriage of the woman with the second husband prevents the Kazee from making an order in favor of the first husband. And the nullification of the oath of the swearer (releasing him from the consequences of his oath and validating his marriage) is not a more laudable act than rendering the second marriage void (that is, of two things, one,—to set aside the oath and validate the first marriage, and the other,—to maintain the second marriage,—the latter is preferable to the former). God knows best.

SECTION I.

ON RENDERING UNLAWFUL ON ONE'S SELF THAT WHICH IS LAWFUL.

2522. (1622.) A man says, "Every thing lawful, is unlawful to me," or says, "Every thing made lawful by God is unlawful to me," or says, "Every thing lawful to Moslems;" and the fact is that he has a wife; and the man forms (or entertains) no particular intention at the time of taking the oath (whether the wife is also included in the oath): the learned lawyers have differed in the matter (*viz.*, whether his wife shall become divorced or not): Sheikh-ool Imam Aboo Baker Mahomed, son of Fuzul, on whom be peace, and the lawyer Aboo Jaffer and Aboo Bakur Iskaf, and Aboo Bakur, son of Syeed, on whom be peace, say, that the man's wife shall become *bain* from him by one divorce (that is, one *bain* divorce shall be caused on her); and if he intends to cause three divorces by his oath, then three divorces shall be caused; and if the man says, "I did not intend by this (that is, by the expression used in the oath), a divorce," he shall not be believed by the Kazee; because, in ordinary parlance (*Oorf*) this expression has become (a formula of) divorce: and for this reason only men (and not women) are made to take such oaths (because a woman has no power to divorce her husband); then if the man has only one wife, she shall become completely separated (*bain*) by one divorce (that is, one *bain* divorce shall be caused on her); and if he has three or four wives, then one complete (*bain*) divorce shall be caused on each one of them.

2523. (1623.) And if the man swears saying, "If I have done such and such a thing, (then what is lawful is unlawful to me)," the fact being that he really has done the act; and he has one wife or several wives: all of them shall become completely separated (that is, a *bain* divorce shall be caused on them so that they would become unlawful); and if he has no wife, then nothing shall be obligatory on him (by way of *Kuffara* &c., as the consequence of a breach of his oath); because this oath has been regarded as an oath of divorce (and not an oath by God); and if we render this expression into an oath by God, then the oath is one of the *Ghoomoos* (or of the kind relating to the past when *Kuffara* is not obligatory).

2524. (1624.) And if the man swears in this form regarding a matter which is to happen in future (saying "if I do so and so, then every thing made lawful by God shall be unlawful to me"); he then does the act,

and he has no wife: it is obligatory on him to make *Kuffara* (or penance) for his oath; because, making upon one's self unlawful that which is lawful is an oath, and for this reason if a man says to another (in Persian), "It is (*Haram* or) unlawful for me to speak to thee," and he then speaks to him, he shall have to pay *Kuffara* (or penance) for his oath; just as if a man says (in Arabic), "By God I will not speak to so and so" (in which case the *Kuffara* is obligatory, and so will it be obligatory in the previous case in which the Persian expression was used and in which the word "God" was not used).

And if he has a wife at the time of the oath, but she dies before the condition (of the breach of oath) is realised, or she has become completely separated without liability to Iddut (at the time the condition of the breach is realised and the man brings the condition into existence) and then (that is, after the death of the wife, or after she has become *bain*) the man brings the condition into existence (and commits a breach of his oath), Kuffara (or penance) shall not be obligatory on him; because (in consequence of the existence of the wife at the time of the oath) his oath could relate to the divorce of his wife at the time the oath came into existence; (that is, at the time of the oath there was a subject on whom the oath could bring its consequence, and that consequence was divorce on the wife then in existence).

But if he has no wife at the time he takes the oath (and consequently the oath becomes one in reference to God) and he afterwards marries a woman, and then acts so as to bring the condition into existence, the learned lawyers have differed in this matter: the lawyer Aboo Jaffer, on whom be peace, says, that the woman whom the man marries after taking the oath shall become completely separated (*bain*); whilst others have said that the woman shall not become divorced, and the Futwa is given accordingly; because the man's oath became an oath by God (and not an oath relating to divorce) at the time the oath was brought into existence (because the man had no wife then); and therefore this oath shall not be an oath relating to divorce after the oath has become (or been converted into) an oath by God.

2525. (1625.) And if the man says (in Persian) "Whatever I hold by the right hand (is unlawful to me):" this is an oath relating to divorce, (and not an oath by God) although he might have no intention to cause his wife's divorce.

And if he says, "Whatever I hold by the left hand, &c." then this oath shall not be regarded as an oath relating to the divorce of his wife,

unless the man has such an intention; because there is no usage for it (that is, according to usage, the expression containing the words "left hand" is not used for divorce). And in the work called the Khoolasa, it is stated that this expression (relating to the left hand) shall not amount to (an oath for) divorce, although the man might have such an intention; because it is not so recognised by usage.

And if the man says, "Whatever I have been holding by the right hand is unlawful to me:" the learned lawyers have said that this is just as if he says, "Whatever I hold by the right hand."

And if he says, "Whatever I hold with my hand" (without specifying the right or the left hand): the learned lawyers have differed in this matter; some of them have said, that the expression shall not become (an oath for) divorce, unless he has such an intention, whilst others have said that, according to usage, that expression is similar to the expression, "Whatever I hold with my *right* hand."

2526. (1626.) A man says to his wife, "Thou art upon me unlawful," and according to him "unlawful" means divorced; but he entertains no intention of divorce: his wife shall become divorced; because when the word according to him means divorce, then he did entertain an intention of divorce.

And if a man says to his wife, "Thou art with me in unlawfulness," that is equivalent to his saying, "Thou art upon me unlawful," and his wife shall become unlawful to him.

2527. (1627.) And if a man says to his wife, "If I do so and so, then thou art my mother," intending thereby that she shall become unlawful to him: this is void, and nothing shall be obligatory on him (either by way of *Kuffara* or divorce; because the man does not say, "like my mother," in which case this would amount to *Zihar*, if such was his intention. See Vol. II, Sharah Vikaya, page 83. He having said, "my mother," it is not possible to give effect to the expression either according to its real or its secondary meaning, and, therefore, it comes to nothing at all. The expression shall not cause divorce, because mother is perpetually unlawful, or Huram-i-Moabbud, and divorce does not involve perpetual prohibition as its consequence; and, therefore, that expression and divorce are inconsistent with each other).

2528. (1628.) A man says (in Persian), "My wife is unlawful, and if she is not unlawful, she is *Kafir*," intending nothing by saying so: the

learned lawyers have said that the man shall be held to have made *Eela* (that is, made a vow not to have intercourse with his wife) and they only say so basing themselves on what is laid down in the Kitab (of Mahomed, with regard to another case): and in the Kitab (of Mahomed) it is stated that when a man says to his wife, "Thou art, upon me, unlawful," he shall be held to have made an *Eela*." But according to usage, this expression amounts to divorce (that is, it operates by way of divorce) and, therefore, the man shall not be held to have made an *Eela*.

2529. (1629.) A man says to his wife twice, "Thou art upon me unlawful;" and intends divorce by the first expression, and an oath by the second: then this will be in accordance with his intention; because when an expression is impossible in its real meaning, it can have a meaning given to it according to intention (because, by the first use of the expression a *bain* divorce has been caused, and the woman has become unlawful, therefore, if the second use of the same expression were to be referred to the real meaning of the expression, that meaning would be useless, because the woman has already become unlawful; and therefore if he intends an oath by the second use of the expression, his intention shall be valid; so that if he were to marry her afresh, and have sexual intercourse, he would have to make a *Kuffara* for the breach of the oath: all this is when the husband has not had sexual intercourse with her; because, if he has had, then he can give her two express divorces).

2530. (1630.) And if a man says to both of the wives he has, "You both, upon me, are unlawful," intending to cause three divorces on one wife and one divorce on the other wife: both of the women shall be thrice divorced according to Aboo Yusoof, on whom be peace; and Aboo Haneefa, on whom be peace, says, that the matter shall be as the man intended, and Futwa is given accordingly.

Moulana (Kazee Khan, the author of these Futawa), on whom be peace, says, that it is fit that the view held by Mahomed, on whom be peace, (no express view on the precise question having been reported from him) should be (taken to be) similiar to that held by Aboo Haneefa on whom be peace.

The principle of this case is the rule which relates to the question whether, when a man uses the formula of *nusur* (or vow), and forms an intention both of an oath (or *Yameen*) and of a *nusur*, the man's intention shall be carried into effect.

And if the man says, "I intended divorce as regards one wife (by the expression stated at the beginning of this paragraph) and oath in regard to the other wife," (that is, he says, "my intention when I said to my two wives, 'You both are upon me unlawful,' was that one should be divorced and the other should be unlawful upon me") then, according to Aboo Yusoof, on whom be peace, divorce shall be caused on both the wives; but according to Aboo Haneefa and Mahomed, it is fit that the result should be as he intended.

[NOTE.—A *nuzur* or vow is to render obligatory or *Wajib* on one's self what is *Moobah* or permissible: the formula or *Seegha* of it is—"*Aluyya* or upon me;" *e.g.*, "I have made the fast of Rujub obligatory on me." *Yumeen* or oath is to render unlawful that which is lawful. A vow necessarily involves an oath: when the vow is to fast in *Rujub*, then there is necessarily an oath not to eat and drink: by the oath, what is the *Zid* or contrary of the particular item of Moobah or thing lawful referred to in the *Yumeen* is rendered *haram* or unlawful. There is no difference between the three Imams in four cases:—*1stly*. When a person uses the formula of vow or *nuzur*, and has no particular intention, then the result is that the matter referred to in the vow shall be obligatory; and in the absence of the vow being carried out, the person shall be sinful; but *Kuffara* shall not be obligatory; because there is no *Yumeen*.—*2ndly*, When there is an intention of a vow or *nuzur* alone, without any intention regarding the oath.—*3rdly*, When there is an intention of a vow or *nuzur*, and a negation of intention regarding oath or *Yumeen*. In the 2nd and 3rd cases the result is the same as in the 1st case.—*4thly*, When there is an intention of an oath or *Yumeen*, and negation of intention regarding vow or *nuzur*: here the result will be only an oath and not a vow. The *fifth* is where there is an intention, both of a vow or *nuzur* and an oath or *Yumeen*: here, according to Aboo Haneefa and Mahomed, the result will be both a vow and an oath; but Aboo Yusoof says, the result will only be a vow. The *sixth* case is where there is an intention of an oath or *nuzur* without a negation of a vow or *nuzur*. Here also, according to Aboo Haneefa and Mahomed, the result will be both a vow and an oath; but Aboo Yusoof says, the result will be only an oath. The *fifth* case applies to the text in the present paragraph. The formula used is that applicable to vow, because the man renders obligatory on him the divorce of his wife, which is only a Moobah or permissible act: then the analogy as regards two intentions in the *fifth* case is pursued fur-

ther: Aboo Yusoof does not allow two intentions, and, therefore, the intention to give three divorces prevails as regards both the wives, and the intention of three divorces prevails upon the intention of one divorce as being more consistent with the meaning of the word, "Unlawful," in the formula used by the husband: but Aboo Haneefa and Mahomed hold both intentions to be valid in the *fifth* case, and, therefore, by analogy, in the present case, the result shall be as intended by the husband.]

2531. (1631.) And if a man, who has three wives, says to them, "You all, upon me, are unlawful" and intends to cause three divorces on one of them, and intends an oath as regards another, and intends a falsehood as regards the third: the learned lawyers have said that each of the wives shall become divorced thrice: Moulana (the author of these Futawa), on whom be peace, says, that it is proper that this should be the result according to the view of Aboo Yusoof, on whom be peace, but that according to inference (*Kyas*) from the view taken by Aboo Haneefa and Mahomed, the result should be according to the intention of the man (so that one wife shall become thrice divorced, and as to another, the expression will be an oath not to approach her, so that if the man has sexual intercourse with her, he shall be liable to penance or *Kuffara*, that is, expiation, and as to the third wife, the expression will be of no effect: be it noted that the expression amounts to a divorce only in consequence of *Oorf* as stated in paragraph 1628; and therefore when the man intends it to be an oath it is not a divorce and does not effect separation).

2532. (1632.) A man has in his hands a number of dirhems, and he says, "These dirhems upon me are unlawful;" he then purchases something with them: he shall commit a breach of his oath (and he shall have to make *Kuffara*); but if he makes a gift of them, or gives them in *Sudka* (charity), he shall not commit a breach of his oath; because by taking such an oath, it is not intended that the exercise of all acts of disposition should become unlawful, but what is intended is only the prohibition against what specially appertains to them in most cases, and that is to use them in making purchases.

2533. (1633.) And if a man says, "This wine, upon me, is unlawful," and he then drinks it: Aboo Haneefa and Aboo Yusoof, on whom be peace, have differed in this matter: one of them (which of them cannot be ascertained) says, that *Kuffara* shall be obligatory on the man; and the other says *Kuffara* shall not be obligatory on him; because (this does not

amount to an oath, inasmuch as) he has merely given information of what is correct (and expressed a fact); but the Futwa is, that the man's intention shall be enquired into; so that if he merely intends an information (or a statement of what is a fact and a correct postulate as regards wine) then he shall not be obliged to make a *Kuffara;* but if he intends an oath, then *Kuffara* shall be obligatory on him; and in the absence of any intention, the man shall not be liable to *Kuffara.*

2594. (1634.) A man says, "What God has made lawful is upon me unlawful;" he then says (in Persian), "And whatever I shall hold by the right hand is unlawful on me (which is an indirect mode of divorcing the wife) if I have done such and such an act," the fact being that he has verily done the act: the learned lawyers have said that (the result is that) his wife shall become completely separated from him (*bain*) with one divorce (that is, one divorce shall be caused on her); because making the divorce dependent on a thing which has already taken place (*e.g.*, in the second expression in which the words used were—"If I have done such and such an act," the act had already been done) amounts to the immediate (or *Tunjees* that is, instantaneous) causing of the divorce: and when the woman has already become completely separated (*bain*) by the first mentioned expression, then the second divorce involved in the second expression shall not affect her (that is, the first expression caused one divorce, and the second expression, which, although expressed in the form of a condition, also has the effect of causing an immediate divorce; but the woman having become completely separated by the first divorce, the second divorce shall not be caused on her; because there is nothing to shew that the intention is to cause another divorce, and the second expression shall be considered as an explanation of the first expression; see Futawai Alumgiree Vol. I, page 533, where it is laid down that if the husband gives one *bain* divorce, and then says, "Thou art *bain,*" only one divorce shall be the result; but if he says, "Thou art divorced *bain,*" then another divorce shall be caused).

And if the (condition or) dependence (in the oath) is upon a future event (*i.e.*, if he says, "If I will do such a thing" instead of saying, "if I have done such and such an act") and the man then does the act by which the condition comes into existence, then two divorces shall be caused on her (because the expression—"what God has made lawful is upon me unlawful" is used in the past sense, the meaning being "has become upon me unlawful;" therefore, if the expression which follows

it has a past sense, then the second expression is capable of being an explanation of the first expression, but if the second expression refers to a future event, then the second expression cannot become an explanation of the first expression).

2535. (1635.) A man says to his wife in a state either of anger or of calmness of mind, "Thou, upon me, art unlawful; then get *Khoola* from me:" one complete (*bain*) divorce shall be caused on her whether he intends a divorce or not.

2536. (1636.) And if a man says to his wife (in Persian), "Deserted, deserted, unlawful, unlawful" but says, "I did not intend divorce by these words:" he shall not be believed by the Kazee; because his expression "deserted" and "unlawful" are words of divorce, he shall therefore, not be believed; and the learned lawyers have said that the woman shall become thrice divorced (because he mentioned the divorce four times); because the divorce caused by his expression "deserted" is one reversible divorce, and when he repeats the same expression then two reversible divorces are caused; and a third divorce is caused by his expression "Unlawful, unlawful" (that is, in reality, four divorces are caused, but three being enough, the fourth goes for nothing).

Section II.

ON DIVORCE CAUSED BY THE VAKEEL (OR AGENT); OR BY THE WOMAN HERSELF (WITH AUTHORITY FROM THE HUSBAND).

2537. (1637.) A man vests the authority to divorce in the hands of his wife; the woman says to her husband, "I have divorced thee:" this act shall be void just as if the husband refers the divorce to himself (saying I have divorced myself); but if she says at the meeting (her authority to divorce herself having been, by the expression used here, confined to divorcing herself at the same meeting), "Thou art, upon me unlawful," or says, "Thou art *bain* from me," or says "I am unlawful on thee," or says, "I am *bain* from thee," then the woman shall become completely separated (*bain*) with one divorce, just as if the husband were to refer the unlawfulness to his own self (saying "I am unlawful on thee").

And if she says, "Thou art *bain*" without adding "from me," or says, "Thou art unlawful" without saying "upon me," then her expression shall be void (*batil*); because the separation of the woman (in the sense that the relationship of husband and wife has come to an

end) and unlawfulness of her, mostly does not take place except when the ownership of marriage is at an end; and therefore the separation as referred to the woman and the unlawfulness as applied to her, will cause divorce; but mere (or absolute) separation and unlawfulness, (as expressed in the expression in which reference is not made by her to herself) will not be sufficient to cause divorce.

And if she says, "I have withheld hands" without saying "my (hands)," she shall not become divorced; just as if the husband says "Exercise thy authority" (*Ikhtary*—an indirect mode of vesting the wife with authority to divorce herself) intending thereby to vest the wife with authority to divorce herself, and the woman says, "I have exercised authority," no divorce shall be caused (unless she says "Over myself" or *nufsy*).

2538. (1638.) And if the man says to his wife, "Exercise thy authority" and the woman says, "I have exercised authority," and then says, "I meant myself (*nufsy*);" then if she says so at the same meeting, she shall become divorced and she shall be believed (by the Kazee): but if she says so after standing up at the meeting, she shall not become divorced, and her word shall not be accepted; because the woman has authority to (exercise her authority and) create (*Insha*) the divorce as long as she remains in the same *mujlis*, and, therefore, her word (expressed at the same meeting) shall be accepted, contrary to the case where she says so after standing up at the meeting.

2539. (1639.) A man vests the authority to divorce in the hands of his wife: the authority shall not be vested in her hands until she knows of it; so that if she divorces herself before knowing that she has been vested with such authority, the divorce shall not be caused on her.

2540. (1640.) A man says to his wife, "The authority to divorce my wives is in thy hands," or says to her "divorce whichever of my wives thou pleaseth;" she then divorces herself: the divorce shall not be caused; and verily have we discussed this matter before. (See paragraph 1462).

2541. (1641.) A man says to his wife, "The authority of three divorces is in thy hands, if thou were to release me from thy dower," and the wife says, "Make me Vakeel with authority that I may divorce myself;" the man then says to her, "Thou art my Vakeel to divorce thyself;" the woman then stands up at the meeting: her authority shall

go out of her hands, so that if she divorces herself (after she has stood up at the place where she had been seated), the divorce shall not be caused; because constituting the wife a Vakeel to divorce herself, is entrusting her (*Tufweez*) with authority to divorce herself, and, therefore, the authority is confined to the meeting; and if she divorces herself at the meeting, then, if she first releases her husband from her dower (and then divorces herself), she shall become divorced; but if she does not release him from her dower (before divorcing herself), then she shall not become divorced; because the authority is vested in her with the condition that she shall release the husband from her dower.

[Note. If a Vakeel is entrusted with authority in some matter, the exercise of that authority is not confined to the meeting where the authority is given; and the Vakeel is at liberty to exercise the authority whenever and wherever he chooses consistently with the terms of his authority: but here, although the woman was apparently appointed the Vakeel, still she was not, in reality, appointed a Vakeel, inasmuch as the business concerned her own self; therefore the appointment was not *Towkeel* but *Tufweez;* and the latter means the making another person owner of an act which appertains to the person making the *Tufweez*].

2542. (1642.) A man says to his wife, "The authority to divorce thyself is in thy hands up to (or for) ten days:" she shall have authority vested in her hands from the time the man so expressed himself for ten days, counting from the moment when the husband said so; because vesting the wife with authority admits of being circumscribed by time and the particle "up to" (*Ila*) expresses the limit (or termination, *i.e.*, *Ghaiť*): on the contrary, if the man says, "Thou art divorced up to (*Ila*) ten days," the woman shall verily become divorced after ten days, because divorce is a thing which does not admit of being circumscribed (*Towkeel*) by time, and, therefore, here the expression, "up to" (*Ila*) shall mean "after" (and the meaning is not that the woman shall remain divorced for ten days).

2543. (1643.) And if a man says, "The authority to divorce thyself is in thy hands up to (*Ila*) ten days" and intends that she shall have authority in her hands after ten days: his intention shall be correct morally speaking as between him and his God, because the man intends what the words used by him admit of (as in the case in paragraph 1642); but the (alleged) intention is contrary to what is apparent, (the obvious meaning being that she shall remain vested with

such authority for ten days and not afterwards), and therefore the man shall not be believed by the Kazee.

2544. (1644.) And similarly, if a man says to another, "The authority to divorce my wife is in thy hands up to one year:" the latter shall have the authority in his hands for a year; and after the expiry of the year, the authority shall no longer remain in him, whether he knows the same or not: (this is *Tufweez* and not *Towkeel*).

2545. (1645.) And if a man gives to his wife authority to divorce herself "for a month" or "for a year," and the woman refuses to accept the authority, or prefers to remain with her husband, or says, "I do not choose to divorce myself," then the authority, which is vested in her hands, shall become void. But Aboo Yusoof, on whom be peace, says, that the authority (shall not be void, but) shall remain in her hands, so that she shall be free to exercise it (if she chooses) at a meeting different from that in which the above conversation took place, (and so on until the month or the year expires).

2546. (1646.) And if a man says to his wife, "The authority to divorce thyself is in thy hands, when thou pleaseth or "as long as (*Muta, i.e.*, the same as 'when' or *Iza*) thou pleaseth:" the authority shall be in her hands (to be exercised) only once whether she exercises that authority at the same meeting or at a different meeting. And if she prefers to remain with her husband, her authority shall go out of her hands; and this authority shall not become void by her standing up at the meeting.

2547. (1647.) And if a man says to his wife, "The authority to divorce thyself is in thy hands as often as (*Koolluma*) thou pleaseth:" the authority shall be in her hands to divorce herself as often as she pleases, until the number three is completed: and if she marries another husband after three divorces, and then goes back to her first husband (by marriage after being divorced by the second husband), then she shall have no further authority in her hands. And if it pleaseth her to divorce herself once, and she becomes (once divorced), and then the same husband marries her after her *Iddut*, she shall still be competent to exercise her pleasure to divorce herself for what remains out of the three divorces (that is, she shall have the power of two divorces; because, under these circumstances, the husband himself has authority to divorce only twice): and if she is pleased to divorce herself once and does become once divorced, and then marries a different husband after the expiry of the *Iddut*, and then goes back to her first husband

(who marries her after the second husband has divorced her), she shall be competent to exercise her pleasure and have the power of three future divorces according to Aboo Haneefa and Aboo Yusoof, on whom be peace: and this case is called the Masalai-Hudum (that is, the case of absorption or effacement of divorce; that is, when the woman comes back to her first husband in the manner described, the latter again obtains the power of three divorces, and whatever divorces he had given in the first relationship of husband and wife, becomes effaced or swept away and removed by the second husband; the wife, therefore, has a corresponding power).

2548. (1648.) And if the husband says to his wife, "The authority to divorce thyself is in thy hands in this year," and the woman divorces herself, and he then marries her: she shall have no further authority (although the year is not out) according to Aboo Yusoof, on whom be peace. And Aboo Yusoof, on whom be peace, says that, according to inference from the view of Aboo Haneefa, on whom be peace, the woman shall still have authority (until the year is out).

2549. (1649.) And if the husband says to his wife, "The authority to divorce thyself is in thy hands in this year" and he (himself) divorces her once, before having sexual intercourse with her, and then marries her again in the same year: she shall (still) have authority in her according to Aboo Haneefa, on whom be peace. (But according to Aboo Yusoof she shall have no authority).

2550. (1650.) A man says to his wife, "The authority to divorce thyself is in thy hands to-day and to-morrow and the day after to-morrow;" the woman then on the same day refuses to accept the authority: her authority for the other days also shall become void (*batil*); and it is not competent to her to divorce herself after this. But it is stated in the Wakyat that it is competent to her to divorce herself on the morrow. But the correct view is that first stated.

2551. (1651.) And if a man says to his wife, "The authority to divorce thyself is in thy hands to-day and the day after to-morrow;" and she refuses to accept the authority that day: she shall be competent to exercise her authority the day after to-morrow (because one day's interruption shows she had two different authorities; and her surrender of one day's authority does not involve forfeiture of the other day's authority).

So also if she says that day, "I have rendered void each authority:" (she shall still have authority in reference to the day

after the morrow; because her surrender of authority, which has not yet come into existence, is not binding on her when the day arrives).

2552. (1652.) And if he says to her, "The authority to divorce thyself is in thy hands to-day and to-morrow," and she refuses to accept the authority that day: her authority shall become (wholly) void; because regard is to be had to the time which has been first mentioned (in the authority), and therefore the authority for the first mentioned time is rendered void by the refusal to accept the authority (and the time next mentioned being adjacent to the first, also goes with it); just as when a man says to his wife, "Thou art divorced to-day, to-morrow" in which case the divorce shall be caused instantaneously.

2553. (1653.) A man says to his wife, "The authority to divorce thyself is in thy hands and the authority to divorce my wife so and so, is in thy hands;" and she says, "I have divorced so and so" and she then divorces herself: this is correct (although not in the order mentioned by the husband) because the whole is one trust (*Tufweez*), and, therefore, whichever she commences with, her authority as regards the other shall not become void.

2554. (1654.) A man vests in his wife the authority to divorce herself, and she says, "Give me so much if thou divorce me," and the husband says, "I do not know this (that is, what thou meaneth);" and the woman says, "If thou hast vested me with authority to divorce myself, then verily have I divorced myself:" the woman shall not become divorced; because when the woman occupied herself in demanding property, her authority became void (because her expression regarding the giving of property shewed hesitation and refusal on her part to accept the authority).

2555. (1655.) A man says to his wife, "The authority to divorce thyself with three divorces is in thy hands," and she says, "Why dost not thou divorce me by thy tongue:" this shall not amount to a refusal to accept the authority (and the *mujlis* does not change, for the topic of divorce was going on), and it shall be competent to her to divorce herself.

2556. (1656.) A man says to his wife, "If thou shalt enter the house of so and so, then the authority to divorce thyself is in thy hands;" the woman enters the house and divorces herself: then, if she divorces herself at a time when she reaches a place (in the house) where she

could be said to have entered the house, and does not advance or recede from that place, she shall become divorced; but if she takes (or advances) two steps from that place (although still within the house) and then divorces herself, she shall not become divorced (because the condition was entry in the house).

2557. (1657.) A man gives in his wife's hands the authority to divorce herself, or gives her the option (to divorce herself or not) whilst the woman is on horseback, and she gets down, or she is on the ground (when the authority or option is given) and she gets on horseback (after hearing of the authority or the option): her option (and her authority) shall become void.

So also (shall her authority or option become void) if she is sitting (when the husband pronounces the words) and then lies down on her side to sleep.

And if she is standing (when the husband expresses himself) but subsequently sits down, or if she is reclining on a pillow but subsequently sits up erect, her option (and authority to divorce herself) shall not become void (because the change in posture in these two cases instead of denoting repugnance implies deeper interest in the subject).

And if she is sitting but subsequently reclines, her option (and authority to divorce herself) shall not become void according to Zoofar, on whom be peace, and the view of Zoofar is one of two traditions from Aboo Yusoof, on whom be peace. Because sitting down (in the case where she was standing when she heard her husband); or reclining (when she heard him whilst she was sitting) takes place to collect one's judgment and does not imply refusal to accept the authority (*Airaz*).

And if she reads a little (after hearing her husband), then her option shall not become void; (but if she reads a long passage, that will imply refusal, and her option shall be void).

And if she is asked to take her meal (after the husband has expressed himself as above) and eats it (at the same place where the authority is given) or if she (after her husband's words) combs her hair, or takes a bath, or dyes (her hair or fingers), or if her husband has sexual intercourse with her, or if she stands up at the meeting (*i.e.*, stands up at the place where she was seated), her option shall become void. So also if she commences her prayers (after the husband has said so, her option shall become void).

But if she is (at the time her husband expresses himself so) in the midst of her *Farz* prayers, the authority shall not become void until she completes her prayers (so that if she continues her prayers instead of interrupting the prayers and exercising the authority, her authority is lost); but if she is in the midst of her prayers of *Nufil*, her option shall not become void, unless she stands up for the next set of prayers (*Shoofa* means a service consisting of two prayers of the *Nufil* kind although the intention might be to offer four or more sets of service at one and the same time and with one and the same intention. See Fatawai Alumgiree, Volume I, page 544).

2558. (1658.) And if the guardians of the wife are assembled and are demanding her divorce, and their discussion is prolonged, and then the husband says to the woman's father, "What do you require of me? do what you require;" and then goes away; and the woman's father then divorces her at the same meeting: the woman shall not become divorced; because what the husband has said is ambiguous; it may imply the entrusting of the authority of divorce to the father of the wife and it may imply something else (*e.g.*, expression of displeasure or disapproval); and, therefore, the words shall not be held to amount to a vesting of authority by reason of this doubt.

2559. (1659.) A woman says to her husband whilst quarrelling, "If what is in thy hands were in my hands, I would have released myself;" the husband says, "What is in my hands is in thy hands," and the woman says, "I have divorced myself thrice;" and the husband says to her, "Say again," the woman says, "I have divorced myself thrice, the husband says, "I did not intend divorce by the expression used by me 'what is in my hands is in thy hands':" the woman shall become thrice divorced by her repeating the expression a second time, "I have divorced myself thrice;" (because when the husband says he had no intention of divorce, then the woman's first expression shall not cause divorce on her; but when the man asks her to repeat it, and the woman does repeat it, this amounts to giving the woman authority); so that if the husband had not said to her, "Say a second time," the word to be accepted would have been his word both morally and according to the Kazee, and his wife would not have become divorced.

2560. (1660.) A man says to his wife, "Say I am divorced:" the divorce shall not be caused as long as the woman does not say so; contrary to this where the husband says (to another) "Say to my wife, verily she is

divorced," the woman becomes divorced at once: and verily have we mentioned this matter. (See paragraph 974).

2561. (1661.) Some high words pass between a husband and his wife, and the wife says, "Oh God, deliver me from this man," and the husband says, "Dost thou wish to be delivered from me? (if so) then the authority (to divorce thyself) is in thy hands," intending thereby divorce, without intending the number; the woman then says, "I have divorced myself thrice;" the husband then says, "Thou hast got deliverance:" no divorce shall be caused on her, according to Aboo Haneefa, on whom be peace; because, when the man does not intend three divorces, then it is the same as if the husband says to her, "Divorce thyself," without intending the number, and in this case if the woman were to say, "I have divorced myself," no divorce shall be caused according to Aboo Haneefa, on whom be peace, but one divorce shall be caused according to the view of his two disciples.

And it is no objection to say—when the husband, after the wife had said, "I have divorced myself thrice," said, "Thou hast got deliverance,"—why does not this expression of the husband amount to ratification (or permission) of the acts of the woman: because we answer the objection by saying that the husband's expression, "Thou hast got deliverance" admits of having been said by way of a joke (or of defiance) and, therefore, the same shall not be held to constitute ratification (or permission), by reason of the doubt.

2562. (1662.) A woman says to her husband (in Persian), "I am thy Vakeel;" the man says, "You are;" the woman then says, "I have divorced myself thrice;" the husband then says in Persian, "Thou hast become unlawful to me, I ought to be separate from thee;" then both separate; then the husband intends to take her back: the learned lawyers have said that the husband shall be questioned as regards his intention; and if he says, "I intended by the words I used (that is, by the words 'You are,') the making her Vakeel to divorce herself, but I did not intend the number," then the woman shall become completely separate (*bain*) with one divorce. This answer is only correct according to the view of Aboo Yusoof and Mahomed, on whom be peace; but, according to the view of Aboo Haneefa, on whom be peace, the learned lawyers have held that no divorce shall be caused; and the *Futwa* is given accordingly. (See paragraph 1661).

2563. (1663.) A woman says to her husband, "Dost thou intend that I should divorce myself;" the man says, "Yes;" the woman then says, "I have divorced myself:" then if the husband intends to entrust the power of divorce to her, she shall become once divorced, but if by the words he used, he intends to mean, "divorce thyself, if it is in thy power to do so" (implying thereby that, "thou hast no power and cannot divorce thyself"), the woman shall not become divorced.

2564. (1664.) A man says to another, "Dost thou intend that I should divorce thy wife thrice?" the husband says, "Yes;" the man says, "I have divorced thy wife thrice:" the learned lawyers have said that the woman shall become thrice divorced. But (this is not correct, and) the correct view is that this case and that which has preceded it (see paragraph 1663) are equal in effect, and divorce shall only be caused when the man intends to entrust the other with authority to divorce.

2565. (1665.) A man appoints another his Vakeel to divorce his wife; the Vakeel then divorces her thrice: then if the husband intended, at the time of appointing the man his Vakeel, to appoint him as a Vakeel with authority to give three divorces, the woman shall become thrice divorced; but if the husband did not intend to give authority to divorce thrice, no divorce shall be caused according to the view of Aboo Haneefa, on whom be peace.

2566. (1666.) A man says to another, "Divorce my wife by reversible divorce;" the Vakeel says to her, "I have divorced thee irreversibly (*bain*—completely):" one reversible divorce shall be caused; but if the Vakeel says, "I have made thee *bain*," no divorce shall be caused (because in the former case that which was done with authority was capable of being separated from that which was done without authority; when he said "I have divorced thee irreversibly," he was acting within his power except in regard to the last word, but the expression without regard to the last word is sufficient to cause one divorce; and, therefore, the last word shall be considered a surplusage).

So also if the husband says to the Vakeel, "Divorce her with an irreversible (*bain*) divorce," and the Vakeel says to her, "Thou art divorced with one divorce reversible:" then one irreversible divorce shall be caused (because when the Vakeel says, "Thou art divorced with one divorce," this must mean that the divorce must be of the nature contained in the authority, and, therefore, one irreversible divorce shall be caused, and the word "reversible" shall be treated as a surplusage).

2567. (1667.) A man says to another (in Persian), "Divorce my wife, in the presence of my brother so and so;" the other man divorces her without the presence of the brother; the divorce shall be caused; because the husband's expression, "In the presence of my brother," was used by the husband by way of advice (to the other man), and, therefore, divorce shall not be dependent on the presence of the brother; just as if a man says to another, "Divorce my wife in the presence of witnesses," and the other man divorces her without the presence of the witnesses, the divorce shall be caused. And this is as if a man appoints another his Vakeel to sell his slave, saying, "Sell him in the presence of witnesses" but the Vakeel sells the slave without the witnesses, the sale shall be valid. On the contrary, if the man says, "Do not sell him except in the presence of witnesses," the sale shall not be valid except in the presence of witnesses.

2568. (1668.) A man says to another, "I do not prevent thee from divorcing my wife:" this shall not amount to constituting the other man a Vakeel; but if he says to his slave, "I do not prevent thee from doing trade," this shall amount to permission to the slave to follow a trade; because the man's expression of this nature to his slave cannot be used except when the master sees the slave selling and purchasing without prevention, in which case (*viz.*, that of passively witnessing the slave's action without active interference) the slave shall become (*Mazoon* or) a slave with authority (or permission) to follow a trade; and, therefore, in this case (when, after seeing all this, the master expressly says, "I do not prevent thee,") it is much more necessary that the slave shall become a slave with authority to follow a trade (*Mazoon*).

And if a man sees a person divorcing his (*i.e.*, the man's) wife, and does not prevent him from doing so, the person who divorces shall not become the man's Vakeel, and the divorce shall not be caused. So also shall the divorce not be caused in the present case (where the man says, "I do not prevent thee from divorcing my wife.")

2569. (1669.) A man says to his wife, "The authority (to divorce thyself) is in thy hands;" she says, "I have chosen (*Ikhtear*, that is, divorced) myself:" the learned lawyers have entered into a discussion in regard to this matter: some of them have said that divorce shall be caused; because this (the husband's) expression is stronger than vesting in the woman the authority to divorce herself (by expressly using the word *divorce*). And this answer is only correct when the husband

intends, by the use of the expression, to entrust his wife with authority to divorce herself; because (simply) "putting her authority in her hands" does not amount to entrusting her with authority to divorce herself except with intention.

2570. (1670.) And when a man entrusts the authority to divorce his wife in the hands of an insane person or an infant (both) having some sense (*Akl*), this shall be valid: and it is not competent to the husband to retract from this.

2571. (1671.) A man entrusts the authority to divorce his wife in the hands of two men: neither of them shall alone be competent to pronounce the divorce.

2572. (1672.) A man says to his wife, "The authority to divorce thyself is in thy hands this year;" he then divorces her once, before having sexual intercourse with her; he afterwards again marries her in the same year: Kurkhy, on whom be peace, says, that the authority to divorce herself shall be in her hands in that year according to Aboo Haneefa, on whom be peace. (See paragraph 1649.)

2573. (1673.) A man appoints another his Vakeel to divorce his wife; the Vakeel then, in a state of drunkenness, divorces her: the learned lawyers have differed in this matter (*viz.*, whether the divorce shall be caused or not): some of them have said that the divorce shall not be caused, just as if a man appoints another his Vakeel to divorce his wife, and the Vakeel becomes insane, and then divorces the wife (in which case the divorce shall not be caused): but the correct view is, that the divorce (so given as above by the drunken Vakeel) shall be caused.

2574. (1674.) A man says to another, "I have appointed thee my Vakeel in regard to all my affairs;" the Vakeel divorces the man's wife: the learned lawyers have differed in regard to this matter; but the correct view is that the divorce shall not be caused.

And in the Fatawa given by Aboo Jaffer, on whom be peace, it is stated that where a man says to another, "I have constituted thee my Vakeel in regard to all my affairs, and I have put thee in my place:" this shall not amount to a general authority; and if the man's affairs are of divers nature, so that he has no known profession in particular, then the agency is void; but if the client is a merchant, then the agency shall relate to affairs of trade. Aboo Jaffer says that if a man says, "I have appointed thee my Vakeel in all my affairs in which agency is permissible," his

agency shall (then) be of a general nature extending to selling and giving lease, and contracting marriages and to all things. And it is reported from Mahomed, on whom be peace, that if a man says that "he is my Vakeel in regard to all things which are legal and which I do," the other man shall become his Vakeel in the matter of selling, and making gifts and granting leases. And it is reported from Aboo Haneefa, on whom be peace, that (in such a case) the man shall be his Vakeel in matters in which consideration passes, and not in gifts and emancipation.

Moulana (that is, Kazee Khan, the author of these Fatawa), on whom be peace, says, all this is true when the appointment is not made in the course of a topic regarding divorce; but if the appointment is made in the course of a topic regarding divorce, the Vakeel shall be authorised to give divorce.

2575. (1675.) The Sultan compels a man to appoint him as his Vakeel to divorce his wife (saying:—Do you appoint me your Vakeel to divorce your wife?) the man from fear of being beaten and imprisoned, says, "Thou art my Vakeel," without adding anything further; the Vakeel then divorces the man's wife; then the client says, "I did not appoint the Sultan my Vakeel to divorce my wife:" the learned lawyers have said that the man shall not be heard, and the divorce shall take place; because the man expressed himself by way of an answer to what was proposed to him, and the answer incorporates what is in the question.

2576. (1676.) A man says to another, "Divorce this my wife," or "Emancipate this my slave," or "Make him (the slave) a *Moodubbhur;*" the Vakeel accepts this, and the client disappears: the Vakeel shall not be compelled to pronounce the divorce, or to emancipate the slave, or to do other things except in one case, *viz.*, if a man says to another, "Make over the cloth to so and so," then the man so ordered shall be compelled to make over the cloth; because in the case of the cloth or other definite thing, it is possible that the cloth might have been kept in trust with the person so directing, and it is, therefore, obligatory on him (the Vakeel) to restore the trust property. But in the case of divorce and emancipation and other matters (compulsion shall not be used on the Vakeel to exercise his authority, because) the man giving the order only directs the Vakeel to act in what was in his (own) power (that is, in matters in which he himself could exercise a choice, and in which he was under no compulsion to act in a particular way, and the person so directing

was not in any way bound to cause the divorce or the emancipation: and therefore compulsion shall not be used on the Vakeel (to exercise his authority and give the divorce, &c.)

2577. (1677.) A man intends to go on a journey; he appoints another man as his Vakeel to divorce his wife; he then takes away the power of the Vakeel, and does so without the presence of the woman (his wife): then, if the appointment of the Vakeel was not made in consequence of the wife having made a request for the appointment of a Vakeel to divorce her, then the revocation of the Vakeel's authority is valid: but if the appointment was in consequence of such a request by the wife, then some of the learned lawyers have said that the husband is not competent to revoke the authority of the Vakeel, except in the presence of his wife; just as if a man appoints another as his Vakeel to fight out his case, and does so in consequence of a demand by the opposite party (who says, for instance, "You are going away, in your absence my *byyunna* or proof by witnesses will not be admissible; therefore you must leave an agent;") and in this last instance the man is not competent to revoke the authority without the presence of the opposite party.

Shaikh-ool Imam Shams-ool Aima Sarukhsy, on whom be peace, says,—that the correct view is that it is competent to the husband to remove (without the presence of the wife) the Vakeel who had been authorised to give divorce, although the Vakeel might have been appointed at the request of the woman; because divorce is not obligatory on the husband (to give) at the request of the wife, and the husband shall, therefore, be competent to release the Vakeel from the agency.

2578. (1678.) And if a man appoints another his Vakeel to divorce his wife, saying, "As often as (*Koolluma*) I shall remove thee, (then) thou art my Vakeel:" some of the learned lawyers have said that this appointment is not valid; because it involves alteration of (or interference with) what is provided by the law (*Shera*), and that (alteration) is to make obligatory what is not so; whilst others have said that the appointment is valid, and the man shall not have authority to dismiss the Vakeel; because as often as the man removes the Vakeel, the latter's appointment comes to be renewed.

Sheikh-ool Imam Shams-ool Aima Sarukhsy, on whom be peace, says, that the correct view is that the man is competent to remove the agent.

The learned lawyers have next differed in regard to the mode of removing the agent. The same Sheikh-ool Imam, on whom be peace, says, that when the man says, "I have removed thee from all agency," the agent shall become dismissed, and this removal shall apply to (both sorts of appointments, *viz.*), appointments which immediately (or instantaneously—*Moonujjuz*) come into effect, or those in which the appointment is dependent on something else (as in the case given, *viz.*, as often as I remove thee, &c). Whilst others have said that the man shall say, "I have removed thee in the same way as I appointed thee my Vakeel," and (yet) others have said that the man shall say, "I have retracted the conditional powers given by me, and I have removed thee from absolute (or unconditional) powers as Vakeel."

2579. (1679.) A woman divorced by *bain* divorce (*Mubtoolutoon*), appoints the husband, who had divorced her, to take her back by a fresh marriage (that is to say, appoints him to marry her to himself, and the divorce having been irreversible and not *Rajue*, fresh marriage is necessary); the Vakeel says, (in Persian) in the presence of witnesses ("I have) brought back in consideration of a hundred dinars:" Abool Kassim Suffar, on whom be peace, says, the marriage is valid, and, says he, the man's expression, "Brought back" is equivalent to his saying, "I have brought (thee) back."

2580. (1680.) A man appoints another as his Vakeel to divorce his two wives, and the Vakeel divorces one of them: she shall become divorced; because the Vakeel performed a part of the duty entrusted to him.

2581. (1681.) A man appoints another as his Vakeel in order to divorce his wife in the traditionary form; the Vakeel then divorces the man's wife at a time other than the traditionary time (*i.e.*, he divorces her at a time when it is not fit, according to the traditions, to give divorce, such non-traditionary time being either a period of pollution or a period of purity in which intercourse has taken place): the divorce shall not be caused at present, neither shall it be caused when the traditionary time arrives. (See paragraph 1697); and the Vakeel shall not go out of his authority; so that if, after this, he divorces her in the traditionary time, the divorce shall be caused.

2582. (1682.) A man appoints another his Vakeel to divorce his wife, and then the client himself divorces her, either irreversibly

or reversibly; the Vakeel then (also) divorces her: the divorce given by the Vakeel shall be caused as long as the woman is in her *Iddut*, and the Vakeel's authority shall not terminate in consequence of the husband himself giving an irreversible (*bain*) divorce, when the divorce given by the Vakeel is not in consideration of property; (that is, if the client authorises the Vakeel to make *Khoola*, that is, to divorce his wife for consideration, and if afterwards the client himself divorces the wife with or without the consideration, the Vakeel's power shall come to an end): then if the Vakeel does not divorce the wife (so divorced as aforesaid by the husband himself) until the client marries her again before the expiry of her *Iddut*, and the Vakeel now divorces her, the divorce given by the Vakeel shall be caused on her (because before expiry of the *Iddut* the marriage still lingers on, and the Vakeel was authorised to divorce within the duration of a particular marriage which does not completely end until the *Iddut* expires): if the client marries her after the expiry of the *Iddut*, and the Vakeel afterwards gives her divorce, the divorce given by the Vakeel shall not be caused.

So also if the husband or wife becomes an infidel (*Moortud*)—may God prevent such a catastrophy—and the Vakeel afterwards divorces her: the divorce given by the Vakeel shall be caused as long as she remains in her *Iddut*; and if the client (the husband) goes to Dar-ool Hurub whilst he is an infidel, and the Kazee decrees that the man has merged (Lehak) into the Dar-ool Hurub (which amounts to a decree of civil death) the appointment as a Vakeel shall become void, so that if the husband returns from the Dar-ool Hurub, as a Moslem, and marries the same woman, and then the Vakeel divorces her, the divorce given by the Vakeel shall not be caused (because he becomes, as it were, born again, and the marriage becomes entirely a new marriage).

And if the Vakeel becomes an infidel—may God prevent such a catastrophy,—he shall remain vested with the authority although he might have gone into the Dar-ool Hurub, except when the Kazee decrees that the man has lapsed (or merged) into the Dar-ool Hurub; because the decree of the Kazee that the man has gone into the Dar-ool Hurub is equivalent to his death.

2583. (1683.) A man says to another, "When I marry such and such a woman, then divorce her;" the man then marries her: it shall be competent to the Vakeel to divorce the woman, because giving conditional powers to a Vakeel is valid.

2584. (1684.) And if a man appoints an absent person to divorce his wife, and the Vakeel divorces her before he comes to know that he has been appointed Vakeel: the divorce given by him is void; because authority as Vakeel is not established in a man before he knows of the appointment.

2585. (1685.) A man appoints another to divorce his wife; the Vakeel refuses to accept the authority (or to act in the matter), but he afterwards divorces the man's wife: the divorce given by him shall not be caused; but if the Vakeel (instead of refusing to act) keeps quiet, and does not (expressly) accept or refuse, and then divorces the woman, the divorce given by him shall be caused by way of analogy (*Istihsan*).

2586. (1686.) A man says to another, "Thou art my Vakeel in the matter of divorcing my wife, if she wishes, or desires, or intends:" the other man shall not become Vakeel until the woman expresses a desire at the meeting (at which she receives the information; because the man made the appointment of the Vakeel dependent on her desire, and therefore the appointment as his Vakeel is confined to the same meeting at which she receives the information; just as if the man makes her divorce dependent on her desire (saying my wife is divorced if she desires; in which case, she must express her desire at the meeting at which she gets the information). And if she expresses her desire (to have herself divorced) at the meeting, the man shall become the Vakeel of the husband; but if the Vakeel gets up at the meeting (at which he has come to be appointed as the husband's Vakeel) before divorcing the woman, his authority as Vakeel shall become void: whilst some of the learned lawyers, on whom be peace, have said that the Vakeel's authority shall not become void (by standing up); because what is made dependent on a condition is, at the time when the condition is found, just as if it is without a condition (*Moorsul*); and therefore it is just as if the husband, after the wife's desire becomes known, says, "Thou art my Vakeel to divorce her;" in which case the exercise of the Vakeel's power does not depend on the (unity of the) meeting.

The learned lawyers have said that the correct view is that taken in the Book (that is, the view mentioned first); because the foundation of the authority to divorce is based on the woman's desire, in pursuance of the husband's words, by which such authority was made dependent on the woman's desire, and her desire is limited to the unity of the meeting (that

is, the desire must be expressed at the meeting) and therefore the Vakeel's power must be limited to the same meeting.

2587. (1687.) And if a man says to another, "Thou art my Vakeel to divorce my wife if thou pleaseth;" the Vakeel expresses his desire at the same meeting: this is valid (that is, it is valid in the Vakeel to express his desire and give divorce at the same meeting; but it is not valid for him to give divorce after the meeting); but if the Vakeel gets up at the meeting before expressing his desire, his authority shall become void; because to make the agency (*Vekalut*) dependent on desire amounts to (*Tumleek* or) making the man owner of the conditional *Talak* for the purpose of causing divorce at the desire (of the man, and *Tumleek* depends on the *Mujlis*).

2588. (1688.) A man says to another, "Thou art my Vakeel to divorce my wife, on condition that I shall have the option (to confirm the appointment or annul it) for three days:" the appointment as Vakeel is valid (and the appointment shall take effect at once) and the option shall be void. So also if the man, whilst appointing another man as his Vakeel, gives the other man the option to accept the appointment or not (the man saying to the Vakeel, I appoint you Vakeel and give you option for three days within which to accept the appointment or not, and the Vakeel agrees to the proposal), the appointment as Vakeel shall be valid and the option shall be void.

So also if a man appoints another as his Vakeel in a matter other than divorce, and stipulates for a condition of option in the appointment of the Vakeel, the appointment as Vakeel shall be valid, and the option shall be void.

2589. (1689.) A man having four wives, says to another person, "Divorce my wife;" and the Vakeel divorces one of his wives without specifying which, or says, "I have divorced thy wife:" the divorce is valid, and the right to determine (on which of the wives the divorce was caused) shall be in the husband and not in the Vakeel: so also if the Vakeel divorces one of the wives, specifying her, the divorce shall be valid; and if the husband says, "I did not mean this wife (that is, it was not my intention that you should have divorced this wife) his word shall not be accepted; and this case is similar to one where a man says, "Sell one out of my slaves," and the Vakeel sells a particular one out of the man's slaves, in which case the sale shall be valid; and if the client says, "I did not intend this slave," his word shall not be accepted.

2590. (1690.) A man says to another, "The authority to divorce my wife is in thy hands, therefore divorce her;" and the person so directed says to her at the (same) meeting, "Thou art divorced," or says, "I have divorced thee:" one complete (*bain*) divorce shall be caused, except when the husband intends three divorces, in which case, three divorces shall (by the Vakeel's expression) be caused. (Two divorces shall not be caused although the husband might have such an intention, because the imperative form denotes the singular number, and that number might be the real or actual singular as in the case of a unit, or it might be singular not actually but metaphorically, that is *collectively*, and in the latter case, it shall apply only to three and not to two divorces).

So also if the man says to another, "Divorce my wife, and the authority to divorce her is in thy hands:" this case and the case just mentioned are equal.

2591. (1691.) And if a man says to another, "The authority to divorce my wife is in thy hands in regard to one divorce" or "as to one divorce;" "therefore divorce her;" the person so directed divorces her at the same meeting: one reversible (*Rujue*) divorce shall be caused. So also if he says to another, "Divorce my wife, and verily have I made over the matter (of giving divorce) to thee:" this is *Tufweez* (or the making over the divorce to the other man) and it is limited to the same meeting (that is to say, the man, to whom the power to divorce is made over, must give divorce at the same meeting); and when the other man (so directed) divorces the wife at the meeting, one reversible divorce shall be caused. So also if he says, "I have made over to thee the matter of her divorce, therefore divorce her:" the latter's power to divorce is limited to the same meeting (at which he is entrusted with the power) and the divorce so given shall be reversible.

[NOTE:—In paragraph 1690, the words used in the Arabic when literally translated stand as follow,—"The authority in regard to my wife is in thy hands;" this is an indirect expression of divorce; for instance, when the husband addressing his wife says, "thy authority is in thy hands," that means that, "Thou hast full authority to remain my wife or not:" the divorce caused by this expression is always *bain* or complete; because in *Rujue* or reversible divorce, the relationship of husband and wife is not completely cut off until the expiry of the *Iddut;* the expression gives her authority either to remain his wife or not to remain his wife; and the way to accomplish the latter aim is by a *bain* or

complete divorce. But when, as in paragraph 1691, the husband expressly mentions one divorce, then his expression means that the authority to divorce once or not is in the hands of the Vakeel or the wife, as the case may be; and when the word *divorce* is used without a qualification, then a *Rujue* or reversible divorce is meant. Therefore in paragraph 1691 one reversible divorce is caused.]

2592. (1692.) And if a man says to another, "Divorce my wife and separate her completely, (that is, 'give her a *bain* divorce')" or says, "Separate her, therefore divorce her:" this is making the other man Vakeel (the imperative form having been used); and it does not depend on the unity (or sameness) of the meeting (that is, the Vakeel need not give the divorce at the same meeting); and it is competent to the husband to revoke the appointment. And when the Vakeel does divorce her, then one irreversible (or *bain*) divorce shall be caused; and it is not competent to this Vakeel (that is, the Vakeel having authority as aforesaid) to give more than one divorce.

2593. (1693.) And if a man says to another, "Divorce my wife, and verily have I made over into thy hands the authority to divorce her," or says, "I have made over into thy hands the authority to divorce her, and (do thou) divorce her:" the divorce implied by the second phrase (in each of the two expressions quoted above) is different from that implied in the first phrase (of each of the two expressions respectively); because the conjunction *and* is used for the purpose of coupling two things: (and the person so directed shall therefore have authority to give two divorces, namely, one by virtue of the expression used before the *and* and the other by virtue of the expression used after the *and*). But the particle (*Therefore*, or) *Fa* (if that particle *Fa* is used instead of the word *and*) comes in this place for the statement of the reason, and, therefore, the person so directed will not be competent to give except one divorce (that is to say, he will not be competent to give more than one divorce).

And if the expression is used with the conjunction *and*, and the Vakeel gives the divorce at the meeting, the wife shall become completely separated (*bain*) with two divorces; because the divorce, which is caused as a consequence of the expression, "The authority to divorce her, &c." is irreversible (or *bain*) divorce (because the expression "*Amroha ba Yudaka*" is one of those indirect expressions which cause irreversible divorce, as other indirect expressions cause reversible divorce): then if one of the two divorces is irreversible, the other divorce also (which is caused

by the imperative form "divorce," and which would otherwise amount to reversible divorce) would be irreversible (or *bain*); because it is quite clear that the man has no power to revoke the divorce (that is, if one divorce is irreversible, then the other, though it would have been otherwise reversible, must, in conjunction with an irreversible divorce, be irreversible; because if the second divorce is reversible, the effect must be that the husband shall have the power to take back the wife; but in consequence of the first divorce being irreversible, the husband shall not have such power: therefore the second divorce must also participate in the character of the first divorce): but if the Vakeel gives the divorce after standing up at the meeting, then one reversible (or *Rujue*) divorce shall be caused, because what amounted to *Tufweez* (or the entrusting of the divorce) becomes void by the person standing up at the meeting, and there remains in him only the power as Vakeel to give an express (or *sureeh*, *i.e.*, direct) divorce.

[Of the two expressions used, the imperative verb, "divorce" is a direct expression of divorce, and it is the form used in constituting another as Vakeel, and the Vakeel is not bound to exercise his authority at the same meeting, and the divorce caused by the Vakeel so constituted is a reversible divorce: the other expression, "The authority to divorce my wife is in thy hands" does not amount to constituting another man as Vakeel but amounts to *Tufweez* or entrusting the divorce to another; and the rule is, that the trustee must exercise the power at the same meeting; and if he exercises this power, then the divorce given by him is, as stated above, a *bain* divorce; so that if he gets up, the meeting is changed, and with the change of the meeting, the authority of the trustee is lost; therefore when the man so entrusted gets up at the meeting, the power is lost, and therefore, if he gives a divorce after standing up, it will only be in the exercise of the power given to him by the imperative verb "Divorce," and this divorce shall, as stated above, be only reversible].

So also if the man says, "The authority to divorce her is in thy hands and do thou divorce her."

2594. (1694.) And if the husband says to another man, "Divorce her and make her completely separate (*bain*—that is, 'give her an irreversible divorce')" or says, "Make her completely separate (*bain*) and divorce her;" the other man then divorces her either at the same meeting or at a different meeting: two divorces shall be caused; because the husband constituted the man his Vakeel (by the use of the imperative

expression) for doing two things,—to completely separate the wife (that is, to cause irreversible divorce) and to give a divorce: and agency (or *Towkeel*) is not rendered void by the agent standing up at the meeting, and, therefore, two (irreversible) divorces shall be caused.

2595. (1695.) A man entrusts the divorce of his wife to an infant: it is laid down in the Oosool (a work of Mohamed) that if the child is able to express himself, then this shall be valid.

2596. (1696.) And if a man makes over the divorce of his wife into the hands of another man, who becomes insane, and then gives the divorce, Mohamed, on whom be peace, says, that if the insane man does not understand what he says, the divorce given by him shall not be caused.

And if the client, who gives the authority to divorce, shall become insane, then, if he becomes temporarily insane and then recovers himself, the Vakeel's authority shall continue to remain in force; but if the client remains insane permanently, the Vakeel's authority shall become void. (See paragarph 1670).

And Ibn-i-Samaa has stated as a report from Mahomed, on whom be peace, that he measured the expression, "permanent" by "one day," at first, but he Mahomed afterwards retracted from this view and said that if the client remains insane for one month, the Vakeel's authority shall cease; but if he remains insane for a lesser period, the Vakeel shall not lose his authority: he then resiled from this view also, and said that the Vakeel's authority shall not cease unless the client remains insane for a year: and Aboo Haneefa, on whom be peace, has not fixed any time for this (*i.e.*, as to what constitutes a permanent insanity).

2597. (1697.) A man says to another, "Divorce my wife, divorcing her according to the *Soonnut;*" the Vakeel says to her, "Thou art divorced according to the *Soonnut*:" then if the woman is in the period of her purity, in which period the husband has not had intercourse with her, and is not in her menses, she shall be divorced once; but if she is in her menses, or if she is in a period of purity such that the husband has had intercourse with her in that period, the expression used by the Vakeel shall become void, and no divorce shall be caused by what he said either at present (because the *Soonnut* divorce is that which is given in a period of purity—See paragraph 1681, in which period of purity the husband has not had sexual intercourse) or when she gets her next menses and becomes pure; because the Vakeel has no power to refer the divorce to any event (by saying

"If you get menses and become pure, then you are divorced"). Because when a man says to another, "Divorce my wife when she gets her menses and becomes pure" and the Vakeel says to her, "When thou shalt get menses and become pure, then thou art divorced," this is void; so also if a man says to another, "Divorce my wife to-morrow" and the Vakeel says to her, "Thou art divorced to-morrow;" this is void: so also if a man says to another, "Divorce my wife" and the Vakeel says to her, "Thou art divorced when thou enterest the house," and the woman does enter the house; no divorce shall be caused (because in all these cases, the Vakeel has no power to refer the divorce to a future event).

2598. (1698.) And if a man says to another, "Divorce my wife thrice, according to the *Soonnut*," and the Vakeel says to her in the period of her purity in which the husband has not had intercourse with her, "Thou art divorced thrice, according to the *Soonnut*;" then (only) one divorce (according to Aboo Haneefa) shall be caused at present, and the rest shall become void (because the Vakeel should have given three distinct divorces in three different periods of purity, in each of which the husband must have had no connexion). And some of the learned lawyers have said that, according to analogy (*Kyas*) from the view of Aboo Haneefa, on whom be peace, it is fit that no divorce should be caused (in the aforesaid case); because the Vakeel was ordered to give one divorce in each period of purity, and (say they) according to Aboo Haneefa, when a man who has been ordered to give one divorce, causes three divorces, no divorce shall be caused. But the most correct view is, that one divorce shall be caused in each period of purity without any difference of opinion (amongst the three Imams; that is, the effect of the expression used, though used once shall be to cause one divorce in each of the three periods of purity); because, according to Aboo Haneefa, on whom be peace, what is necessary (in order to legalise the act of the Vakeel) is concordance (between what the Vakeel did and what he was authorised to do) with regard to words (that is, verbal correspondence or agreement) because when a man says to another "Divorce my wife thrice" and the Vakeel divorces her "A thousand times" (saying, "I divorce thee a thousand times,") this is not valid (and no divorce shall be caused); so also if a man says to another, "Divorce my wife, half a divorce" and the Vakeel divorces her "once," no divorce shall be caused (although, in substance, both the

expressions amount to the same thing, because half a divorce is equivalent to one divorce): and in the present case, verbal concordance is found (because the client has said, "Divorce thrice according to the Soonnut" and the Vakeel has exercised his authority by saying, "I divorce thee thrice according to the Soonnut"); and therefore one divorce shall be caused (in the present period of purity, and two more divorces shall be caused in the two succeeding periods of purity).

2599. (1699.) A man says to another, "Divorce my wife thrice according to the Soonnut in consideration of a thousand;" the Vakeel says to her, at a time which can be appropriately called the Soonnut time (that is, during a period of purity in which no intercourse is found), "Thou art divorced thrice, according to the Soonnut, in consideration of a thousand;" and the woman accepts this: one divorce shall be caused in consideration of one-third of a thousand; and if the Vakeel, when the second period of purity arrives, gives her one divorce in consideration of one-third of a thousand, and the woman accepts it, then another divorce shall be caused without her being obliged to pay anything for it, (not even the one-third stipulated at the second divorce; because when she stipulated to pay the first one-third, that was in consideration of the *Milk-i-Moota* or the right of being enjoyed by the husband; therefore such right must have come to an end by the first stipulation to pay a third and nothing after that remains for which the second one-third would be a consideration); so also if the Vakeel gives her a third divorce in the third period of purity (no consideration is obligatory on the wife). But if the Vakeel first gives her one divorce in consideration of one-third of a thousand, and the husband then marries her again, and the Vakeel then again gives her another single divorce in consideration of one-third of a thousand, the second divorce shall be caused in consideration of one-third of a thousand; (because by the second marriage the *Milk-i-Moota* is found with a fresh start, and, therefore, there would be consideration in the case given); and so the third divorce in the same way (that is, if the third divorce is given after the third marriage, then the remaining one-third of the thousand shall be payable).

2600. (1700.) When a man appoints two persons as Vakeel to give divorce to his wife, (without saying "you two must act jointly in the matter of the divorce") each of the two shall be competent to give divorce, when the divorce is not in consideration of property. (See paragraph 1702 *post*).

2601. (1701.) And if a person appoints two men (jointly) to

give divorce to his wife, and says, "One of you should not divorce her without the other," and one of them divorces her; and then the other also divorces her, or one of them gives the divorce, and the other permits the same: then no divorce shall be caused.

2602. (1702.) And if a man appoints two persons to give divorce in consideration of property, one of them cannot act without the other: so also in the matter of emancipation, whether they are appointed Vakeels on behalf of the husband or on behalf of the wife.

2603. (1703.) And if a man says to two men, "Divorce her thrice you both together," but one of them divorces her once, and subsequently the other divorces her twice, no divorce shall be caused unless both of them join together and give three divorces.

2604. (1704.) A Vakeel having authority to divorce, when the divorce is not for consideration, is not dismissed (that is, does not lose his authority) by the client himself giving the divorce, whether the client gives an irreversible (or *bain*) divorce or a reversible (or *Rujue*) divorce: and it shall be competent to the Vakeel, after the husband has so divorced as aforesaid, to divorce her, as long as she is in her *Iddut*; and when the *Iddut* expires, the Vakeel shall become dismissed (or go out of office; because by the expiry of the *Iddut* the relationship of husband and wife ceases to exist): so, if the client marries her after the expiry of the *Iddut*, and subsequently the Vakeel divorces her, no divorce shall be caused; but if the client marries her before the expiry of the *Iddut*, and the Vakeel subsequently divorces her, the divorce shall be caused. (See paragraph 1682).

2605. (1705.) A man says to another, "Divorce my wife once in consideration of a thousand dirhems;" the husband then himself divorces her in consideration of a thousand dirhems, and the woman accepts this: she shall become once divorced in consideration of a thousand dirhems, and this shall amount to the dismissal of the Vakeel, whether or not the Vakeel knows that the client has given the divorce; so that if the client marries her after having himself divorced her (as aforesaid), and then the Vakeel gives one divorce to her in consideration of a thousand, and she accepts the same, no divorce shall be caused, because the Vakeel became dismissed by the client having himself divorced his wife.

2606. (1706.) A man divorces his wife by a complete (or *bain*) divorce, and then says to another, "Divorce her in consideration of a

thousand;" before the Vakeel divorces her, the husband marries her (again) during her *Iddut*; if the Vakeel then divorces her in consideration of a thousand, and the woman accepts the same, the woman shall become divorced in lieu of a thousand; but if the husband does not marry her before the divorce is given by the Vakeel, and the Vakeel divorces her once during her *Iddut* in consideration of a thousand, and the woman accepts the same, then one divorce shall be caused on her, and she shall not be obliged to pay anything (because the husband has already irreversibly divorced her, therefore there is no consideration for the thousand; but the divorce given by the Vakeel having been given during the *Iddut*, when the relationship of husband and wife was not completely cut off, the divorce shall be caused).

On the contrary (as in paragraph 1705), when the husband appoints another as his Vakeel to divorce his wife in consideration of a thousand, and then the husband himself divorces her in consideration of a thousand, and then the Vakeel also divorces her in consideration of a thousand, the divorce given by the Vakeel shall not be caused; because the appointment of the Vakeel, before the husband divorced his wife, was with the object of establishing property (that is, obtaining the consideration of a thousand dirhems) and when the client himself divorces in consideration of a thousand, after the appointment of the Vakeel, then it is not possible to imagine a divorce (to be given by the Vakeel) which would establish property (or bring the consideration of a thousand which has been already brought in) and therefore the Vakeel shall necessarily go out of his office.

But when (as in paragraph 1706) the man appoints another man as his Vakeel in order that the latter might, in consideration of a thousand, divorce the woman who is already completely separated, then (what) he (does is that he) appoints the Vakeel to divorce in a way in which the consideration is merely mentioned, and not in a way to establish the consideration (because the husband having already completely divorced his wife, he cannot stipulate for a consideration to be realised a second time by the Vakeel); because the husband was himself, at the time of appointing the Vakeel, not competent to give such a divorce; and therefore when the Vakeel performed the act he was charged with, the divorce shall be caused (without the woman being liable to pay the thousand).

Just as if a man appoints another as his Vakeel to sell his slave, but

the Vakeel becomes insane, but the insanity is of a character so that the Vakeel continues to understand what a sale is, and what a purchase is, and the Vakeel then sells the slave, the sale by the Vakeel shall not be operative: (this is an example to illustrate the case involved in paragraph 1705). And if the man appoints as his Vakeel to sell his slave a man who is already insane in the same way (that is, whose insanity is of the same character as aforesaid) and the Vakeel then sells the slave, the sale by the Vakeel shall become operative. Because when the Vakeel was not insane at the time of his appointment, then the authority to sell was such that the responsibility in the matter of the sale (such as to surrender property and realise consideration) appertained to the Vakeel; and after the Vakeel became insane, if the sale by him were to be held to be operative, then the responsibility would (no longer be fixed in the Vakeel but would) be on the client, and therefore the sale by such Vakeel shall not be operative.

But if the Vakeel was already insane at the time of his appointment, then, when he is appointed to sell, the responsibility in the matter of the sale (*e.g.*, to receive the purchase-money and surrender the thing sold, &c.,) was with the client (from the beginning), and when such Vakeel does the act which he is charged to do, the sale by him shall be binding on the client.

2607. (1707.) A man appoints another as his Vakeel to divorce or to emancipate; the Vakeel appoints another man as his Vakeel, and the latter gives the divorce, either in the presence or absence of the first: his act is not valid.

2608. (1708.) So also if a man appoints another as his Vakeel to divorce or to emancipate, and a stranger divorces the wife, and the Vakeel ratifies the act, the act shall not be valid.

2609. (1709.) And in the case of *Khoola* and of marriage, when a Vakeel appoints another as his Vakeel, and the Vakeel's Vakeel does the act (relating to the *Khoola* or marriage) in the presence of the first (*i.e.*, in the presence of the Vakeel), or if a stranger does the act (in the presence of the Vakeel), and the Vakeel permits this (or ratifies it), the act shall be valid.

2610. (1710.) And it is reported from Mohamed, on whom be peace, that in a case in which there are two men, each of whom owns a slave; and each of the masters appoints one and the same man to emancipate his slave, and the Vakeel says, "I emancipate one of the two

slaves" and then dies before he could specify which slave he meant to emancipate: it is said by Mohamed, on whom be peace, that reasoning from analogy (or *Kyas*), no slave should be emancipated, but "I (Mohamed) think it preferential to emancipate both the slaves (because to emancipate a moiety of a slave is to emancipate him in his entirety) and each of the slaves shall work so that each should earn to the extent of a moiety of his price (and the respective masters shall each get such moiety)."

2611. (1711.) When a Vakeel, authorised to emancipate, admits that he emancipated the slave "yesterday" and the principal falsifies him (in regard to the fact of the emancipation), the Vakeel's word shall not be accepted; because his admission of having emancipated the slave is made at a time when his authority is at an end (on his own shewing; because his authority comes to an end when he gives the emancipation); so also in the case of a Vakeel who has authority to divorce.

CHAPTER III.

SECTION 1.

ON KHOOLA.

2612. (1712.) [NOTE.—*Khoola* means to take off, *e.g.*, you take off your clothes or take off your boots: its secondary meaning is to take off clothes: the spouses are as clothes to each other, and when they make *Khoola* each of them takes off his and her clothes. According to the Shera, *Khoola* consists in destroying the *Milk-i-Nikah* or ownership of marriage with the consent and acceptance of the wife by the use of the word *Khoola*, or what is tantamount to that word. See Buhur-ool Raik, a Commentary on Kunz-ool Dakaik, Vol. IV, page 77, Egyptian Edition of 1311 Hijree.]

Khoola, and Divorce in consideration of property are tantamount to an oath on behalf of the husband: so is also emancipation in consideration of property an oath on behalf of the master: and the *Khoola* and divorce in consideration of property consist in the making of a return (or *Moawiza*, that is, the payment of consideration) on behalf of the wife; so also is emancipation in consideration of property the making of a return (or the payment of consideration) on behalf of the slave; and therefore the laws of oath must be observed on behalf of the husband; so that if the husband says, "I have given thee *Khoola* in consideration of so much" (and this is tantamount to an oath in this way because it is

equivalent to saying, "If thou shalt agree to pay so much, I will give thee up as my wife"), and if, before acceptance by the wife, the husband retracts from what he has said, it shall not be competent to him to do so (because after an oath has been taken, it cannot be retracted): so also if the husband stands up (at the meeting, and this standing up denotes change of the meeting) before acceptance by the wife, the acceptance by her shall be valid (because *Khoola* is an oath, and the oath-taker cannot avoid it by changing the meeting; but the wife can avoid it, see paragraph 1713 *post*); and the statement of the husband shall be binding on him, although the woman might have been absent (at the time of the statement); and when the wife receives intelligence (that the husband has given her the *Khoola*), it is necessary for her (if she is desirous of accepting the *Khoola*) to express her option of acceptance at the meeting at which she receives the intelligence.

So also if the husband says, "When to-morrow arrives, I shall give her *Khoola*, in consideration of a thousand," or says, "When so and so shall arrive, then I shall give her *Khoola*, in consideration of a thousand," it is valid for him to say so (because *Khoola*, as regards the husband is an oath, and an oath admits of a condition); and the woman must (if at all) accept the *Khoola* after the arrival of the morrow or after the arrival of the so and so, at the same meeting (that is, at the same meeting at which the morning dawns on her or at the same meeting at which the so and so on his arrival finds her).

And if the husband stipulates for a condition of option (for himself) in the matter of *Khoola*, the condition of option by the husband shall not be valid, just as the condition of option is not valid in any way in a (mere) oath, (although such condition is here according to Aboo Haneefa valid on behalf of the woman, on whose side *Khoola* is not an oath).

2613. (1713.) And the laws relating to the (*Moawizat* or) the making of return (and passing of consideration) shall be conformed to on behalf of the wife and the slave (whose emancipation is dependent on a consideration): so that if the wife makes a beginning in the matter of *Khoola*, and subsequently retracts before acceptance by the husband, it is competent to her to retract, whether the husband knows of the same or not; and her proposal to get the *Khoola* shall become void by the standing up of either of them (before the acceptance by the husband), whichever of the two might stand up.

And the proposal made by the wife shall not be valid, when the husband is absent, and when nobody (on behalf of the husband) accepts the same. And the proposal made by the woman or the slave does not admit of being made dependent on any condition or of being referred to time (because it is *Moawiza* on their behalf, and *Moawiza* does not admit of a condition).

And if the woman, in obtaining the *Khoola*, stipulates for a condition of option for herself, it is valid in her so to stipulate, according to the view of Aboo Haneefa, on whom be peace (because *Khoola* is *Moawiza* on her side); but his two companions have held that such stipulation is not valid.

2614. (1714.) *Khoola* is sometimes effected by the use of the word "*Khoolx*" and sometimes by the use of the words "sell and purchase" and sometimes by the use of the Persian language. And if the *Khoola* has been effected by the use of the word, "*Khoola*," then, if the husband has given her *Khoola* in consideration of specific property (*e.g.*, for a thousand dirhems or a piece of cloth), and the husband does not make any mention of the wife's dower, and the wife accepts this *Khoola*, the wife shall be bound to pay the consideration (and the consideration shall not be set off against the dower); and the effect as regards the dower in this case is this, that if the wife is one, with whom the husband has had sexual intercourse, and she has already realised her dower, then she shall be liable to pay the consideration for the *Khoola*, and no party shall be entitled to have any claim against the other party for anything, according to them (that is, Aboo Haneefa, Mohamed and Yusoof); but if the wife is not one with whom the husband has had sexual intercourse, and she has already realised the whole of the dower (she being only entitled to a moiety of the dower, not being one with whom there has been sexual intercourse), then, according to Aboo Haneefa, on whom be peace, the husband shall only be entitled to get the consideration from the woman and nothing else (that is, he shall not get back the moiety of the dower); but according to his two companions, on whom be peace, the husband shall be entitled to get, from the wife, the consideration for the *Khoola* and also (get a return of) a moiety of the dower: but if the dower has not already been realised by the wife (whether she is one with whom the husband has had intercourse or not) then, according to Aboo Haneefa, on whom be peace, the woman shall not be entitled to get from the husband anything on account of dower, but according to his two disciples on whom be peace, the woman shall get from the husband, a moiety of the dower.

[NOTE.—This case has become confused, and the rule has become obscured owing probably to attempts from time to time, to supply ellipsis in the Text of Kazee Khan; so that from the Text as it stands, the correct rule applicable to the various forms in which this case resolves itself cannot be clearly realised. But having consulted the following authorities, the rule appears to be as stated below: Inaya, Vol. II, page 230; Shuruh Vikaya, Vol. II, page 82; Fatuh-ool Kudeer, Vol. II, page 284. When the husband gives *Khoola* in lieu of some specific property other than the dower, then the husband is entitled to the consideration: and as regards the dower the rule is as follows:—Firstly, if the wife is one with whom the husband has had intercourse and she has already realised her dower, then the husband is not entitled to get back the dower; and if she has not realised the dower then, according to Aboo Haneefa, she is not entitled to claim the dower; because, according to him, *Khoola* puts an end to all rights, which the spouses have against each other—except her maintenance during the period of the *Iddut*, the right to which is not put an end to except by express agreement, and except also the right of dwelling or *Sookna* during the *Iddut*, which being, as it is termed, the right of God, cannot be put an end to even by express agreement: but according to the two disciples the wife shall be entitled to claim the whole of the dower from the husband, because the dower is her right, she being one with whom the husband has had intercourse, and the dower has not been realised by her. If she be one with whom the husband has not had sexual intercourse, then if she has realised the whole of the dower, the husband, according to Aboo Haneefa, is not entitled to get a return of any portion of the dower from the wife; but, according to his two disciples, the husband is entitled to get returned to him one half of the dower, because, before intercourse, only one half of the stipulated dower becomes due: if the woman has not realised her dower, then according to Aboo Haneefa, the woman is not entitled to claim any dower from the husband; but according to his two disciples, she shall be entitled to recover one half of her dower from her husband.]

2615. (1715.) And if the husband has made *Khoola* with his wife in consideration of her (entire dower) saying, "I give *Khoola* in consideration of the whole of the stipulated dower" (which amounts to so much, say a 1,000), then if the wife is one with whom the husband has had sexual intercourse, and if she has already realised her dower, then the husband shall get back from her the dower so realised

by her; but if she has not already realised her dower, then the whole of the dower shall cease to be recoverable from the husband, and no party shall pursue the other in respect of anything: but if the wife is not one with whom the husband has had sexual intercourse, then if the wife has already realised the whole of the dower (although she was entitled to get only a moiety), which say was a thousand, the husband shall be entitled to get from the wife the whole of the dower according to obscure analogy (or *Istihsan*), but according to clear analogy (*Kyas* or reasoning), the husband shall be entitled to get from the wife a thousand and five hundred, that is, a thousand in consequence of the dower having been the consideration for the *Khoola*, and five hundred in consequence of (the *Khoola* having been) a divorce (or *Talak*) before he has had sexual intercourse with her (that is, the dower being the consideration for the *Khoola*, the husband is entitled to get back the whole of the dower which in this case is a thousand; but by another right he is entitled to get back five hundred, because the wife was only entitled to get five hundred, in consequence of the absence of sexual intercourse; but she has realised a thousand, and, therefore, she is the husband's debtor to the extent of five hundred, which he is entitled to recover from her); but if she has not realised her dower then, according to clear analogy (*Kyas*) the husband shall (in the net result) realise from her five hundred (that is, the consideration for the *Khoola* was one thousand, but the wife was entitled to five hundred from the husband in consequence of the separation having been before intercourse; this five hundred is set off against the thousand, and the husband would be entitled to recover five hundred), but according to obscure analogy (*Istihsan*) the dower shall drop from the husband, and the husband shall not be entitled to realise anything from the wife.

2616. (1716.) And if the husband has made *Khoola* with the wife in consideration of a portion of her (due) dower (without mentioning the amount); as for instance, when he makes *Khoola* with her for a tenth part of her dower, her dower being a thousand, then if the wife is one with whom the husband has had sexual intercourse, and if she has realised the whole of her dower, the husband shall realise from her a hundred dirhems, and the rest of the dower shall appertain to her according to them (Aboo Haneefa, Mahomed and Aboo Yusoof); but if the dower has not been already realised by the wife, then according to Aboo Haneefa, on whom be peace, the whole of the dower shall cease to be payable by the

husband (because *Khoola* puts an end to all rights arising from the *nikah*, as between the husband and the wife, see page 82, Shuruh Vikaya, Vol. II); but according to his two disciples only one hundred dirhems shall become extinct (and not realizable) from the husband, and the wife shall be entitled to realise from him the nine hundred; but if the wife is not one with whom the husband has had sexual intercourse, then if she has already realised the whole of the dower, the husband shall be entitled to realise from the wife the tenth of a moiety of her dower that is fifty, because her dower, in the case of divorce before sexual intercourse, is a moiety of the (fixed) dower, and, therefore, the husband shall realise from her the tenth part of a moiety only of her dower, and the rest shall appertain to her (this is according to Aboo Haneefa); but according to the two disciples of Aboo Haneefa, the husband shall realise from her fifty, for the reason stated (*viz.*, that five hundred shall be considered to be her dower) and the husband shall also realise from her five hundred, on account of the divorce before sexual intercourse: but if the wife has not already realised her dower, then the husband shall become free from liability for the whole of the dower according to Aboo Haneefa, on whom be peace; but according to his two disciples, on whom be peace, five hundred will drop from the husband on account of the divorce before sexual intercourse and fifty will cease to be payable by him in consequence of the same being the consideration for the *Khoola;* and the woman shall realise from the husband four hundred and fifty.

2617. (1717.) And if *Khoola* takes place by the words "mutual release" (*Moobaraat*), then the effect (on the rights of the parties on the questions which have preceded), according to Aboo Haneefa, on whom be peace, is what we have stated in regard to *Khoola* according to him: and according to Mahomed also, on whom be peace, the consequences are the same as those mentioned by us in regard to *Khoola* according to him: but according to Aboo Yusoof, on whom be peace, the consequences in the case of "Mutual release" (*Moobaraat*) are the same as those stated by us in regard to *Khoola* according to Aboo Haneefa, on whom be peace.

2618. (1718.) And if the husband divorces his wife in consideration of property or in consideration of her dower, then according to Aboo Yusoof and Mahomed, on whom be peace, the consequences involved in the same are similar to those involved in *Khoola*, according to them (respectively). But from Aboo Haneefa, on whom be peace, there are two traditions in this matter; and according to one tradition, the

consequences involved in such a divorce are those stated by us in regard to *Khoola* as laid down by him; but according to another tradition, such consequences are those stated by us as laid down by Aboo Yusoof and Mahomed, on whom be peace, (as regards *Khoola*) and this (latter) view is correct; so that if a man divorces his wife, before having intercourse with her, in consideration of a thousand dirhems, and the dower due from the husband was three thousand dirhems, then by reason of the divorce before sexual intercourse, one thousand and five hundred shall be extinguished, and there shall remain one thousand and five hundred, and the husband has to receive from the wife as the consideration for the divorce, one thousand dirhems, and therefore this one thousand (so due to the husband) shall be set off in the thousand (which is a part of one thousand and five hundred due to the wife as aforesaid) and the net result to her is five hundred due from the husband, and this five hundred shall not drop.

2619. (1719.) So also if a man marries a woman for a thousand dirhems and has no sexual intercourse with her, and the wife does not realise any portion of her dower: so that the husband makes *Khoola* with the wife for (a definite and certain amount, that is, for *mal-i-moeyan* or) a thousand dirhems (without saying that the *Khoola* is in consideration of the dower). Aboo Haneefa, on whom be peace, says, that the wife shall be bound to pay a thousand (to the husband on account of the consideration for the *Khoola*) and she shall not be entitled to realise anything (from the husband on account of her dower). And Aboo Yusoof and Mahomed, on whom be peace, have said that the wife shall pay five hundred to the husband (in cash as a net result) and the other five hundred dirhems (being part of the consideration for the *Khoola*) shall be set off in the five hundred due to the wife on account of the dower.

2620. (1720.) And if the *Khoola* is made by the use of the words, sale and purchase, (the woman saying, "I have purchased myself for so much") then Aboo Yusoof and Mahomed, on whom be peace, say, the consequences thereof (on the parties) shall be what the use of the word *Khoola* involves; and the Mashaikhs, on whom be peace, have differed regarding the view entertained by Aboo Haneefa, on whom be peace, in the matter: some of them have laid down that, according to Aboo Haneefa, the consequences of the use of the words, sale and purchase in the matter of *Khoola*, are those which the use of the word *Khoola* involves (according to him); whilst others have held that *Khoola* by the

use of the words, sale and purchase, according to Aboo Haneefa, on whom be peace, does not result in a release from the dower, unless the release from the dower is (specifically) mentioned, and that is the view of Aboo Yusoof and Mahomed (see paragraph 1714), and the view so taken by the last mentioned Mashaikhs (who constitute the "others" of those who entertain conflicting views) is correct.

2621. (1721.) And when the *Khoola* is made with the word "*Khoola*," does the husband get released from the other debts (due to the wife) different from the dower? According to Aboo Haneefa, on whom be peace, such release does not take place according to the Zahir-i-Ruwayet, and that is correct.

2622. (1722.) And in cases of *Khoola*, and of *Moobaraat*, and of divorce in consideration of property, the husband is not released from maintenance during the period of the *Iddut*, according to them (that is, the three Imams), unless by (express) stipulation. (See paragraph 820).

2623. (1723.) So also the husband is not released from the maintenance of the child and the maintenance due on account of fosterage, without such release being stipulated for (in all cases where the separation takes place between the husband and wife either by reason of divorce, or of *Moobaraat* or of *Khoola*), and if the husband has stipulated for such release then, if such release has been agreed upon for a specified period, such stipulation for release shall be valid, not otherwise.

2624. (1724.) And if the release is valid on account of there being a stipulation in regard to time and condition, then if the child dies before the completion of the period (to which the release extends) it shall be competent to the husband to realise from the wife the proportionate part of the wages (for such fosterage or maintenance of the child) for the rest of the time (because the act of the wife in releasing the husband from such liability, amounts to receipt in full in advance; but when her services do not extend for the whole of the period, she must make a proportionate return of what was received by her in advance).

And if the wife intends that the husband should not have the right to realise such proportionate part as aforesaid, the learned lawyers have said that the device in such a matter is, that the husband should say to the wife, "I have made *Khoola* with thee on condition that I am released from the maintenance of the child for two years; and if the child dies

before the expiry of the period of release, then it shall not be competent to me to realise anything from thee."

And the like of such a case will be discussed in a separate section, if it pleases God. (See the untranslated portion of Fatawai Kazee Khan, that is, the original Arabic work, Vol. III, pages 490 to 503; section on Ibrai or Release from a fraction on condition of prompt payment of the rest, and on the release of maintenance and purchase money).

2625. (1725.) A man says to his wife, "If thou shalt enter the house, then verily have I made *Khoola* with thee in consideration of a thousand;" the woman then enters the house: one divorce shall be caused for a thousand, always supposing that the woman, at the time she enters the house, accepts the proposal to take the *Khoola* in lieu of a thousand; because *Khoola* being an oath from the husband's point of view, it is valid to make the same dependent on a condition. (See paragraph 1790, *post*).

2626. (1726.) A woman says to her husband, "I have taken *Khoola*, (*Ikhtelato*) from thee in lieu of so much;" the husband was at that time occupied in weaving coarse cloth (*Kirbas*), with which occupation he went on, while disputing the matter with her, and he then said (ultimately), "I have given thee *Khoola*": the learned lawyers have said, that if the husband did not protract the occupation (which was engaging him when the wife made her request) then his last words shall constitute an answer to what the woman asked for, because the meeting (*mujlish*) did not change by the little work that the husband was doing; but if the husband protracted the work, the meeting (at which the wife made her request), came to an end, and in this case what the husband said shall not constitute an answer.

2627. (1727.) A man says to his wife, "I have made *Khoola* with thee;" the woman says, "I have accepted:" one complete (*bain*), divorce shall be caused (and the same shall not amount to *Khoola*, because no property was mentioned as the consideration for the *Khoola*). So also (one complete divorce shall be caused), if the woman does not say, "I accept;" because divorce takes place by the husband, saying, "I have made *Khoola* with thee." And if after this, the husband says, "I did not intend by so expressing myself, a divorce," then the word to be accepted shall be his, if the expression used by him was not used, whilst there was a discussion of divorce. (The expression, "I have made *Khoola*

with thee," when the consideration is not mentioned, is an indirect expression of divorce; but there must be an intention of divorce: see also paragraph 1809 *post*).

2628. (1728.) And if the husband says, "I have made *Khoola* with thee, in consideration of so much," mentioning some specified property (*e.g.*, say a thousand dirhems): the divorce (as a consequence of the *Khoola*) shall not be caused, until the woman accepts (the husband's proposal): just as if the husband says to his wife, "I have divorced thee in consideration of a thousand dirhems," the divorce shall not be caused until the woman accepts it. And if after the acceptance by the woman, the husband says, "I did not intend divorce by the use of the expression," he shall not be believed by the Kazee, because the mention of consideration apparently denotes intention to divorce.

2629. (1729.) And if the husband says to his wife, "Make *Khoola* upon thyself," (that is, he uses the imperative form by which he constitutes her his Vakeel to give *Khoola* from him to her), or says, "ask thy *Khoola*;" this case resolves itself into three forms: one of them is, if the husband says, "Make *Khoola* upon thyself in consideration of property," without specifying the property, and the woman says, "I have given *Khoola* to myself for a thousand dirhems:" in this case, the divorce shall not be caused until the husband says, "I have ratified this," because the indefiniteness of the consideration, prevents the validity of the appointment as a Vakeel; the second form is when the husband says, "Make *Khoola* with thyself in consideration of a thousand," and the woman says, "I have made *Khoola*," (without repeating the consideration), then according to one tradition, the *Khoola* shall not be completed, until the husband says, "I have ratified the same," just for the reason stated in the first case (that is, the vagueness of the consideration is felt here also in consequence of the woman having failed to repeat the consideration); but according to another tradition, the *Khoola* shall become complete for the consideration of a thousand, although the husband might not say, "I have ratified" (because there is no indefiniteness; and although the woman failed expressly to mention the thousand, still the answer incorporates the question, and she must be held to have mentioned the thousand): and this view is correct.

And the third form is when the husband says to his wife, "Make *Khoola* with thyself," without adding anything further, and the woman says, "I have made *Khoola*:" it is stated in the Moontuka as a tradition

from Aboo Yusoof, on whom be peace, that this shall not amount to *Khoola*.

So also if he says to another, "Make *Khoola* with my wife," (that is appointing him as a Vakeel to make the *Khoola*), it is not competent to the Vakeel to make the *Khoola* except in lieu of property; because *Khoola* is mostly accompanied by consideration. (See paragraph 1764, *post*.)

And Ibn-i-Samaa, has reported from Mahomed, on whom be peace, that when the husband says to his wife "make *Khoola* with thyself," and the woman says, "I have made *Khoola*," one complete (or *bain*) divorce shall be caused without consideration, just as when the husband says to her, "make thyself *bain*," (or give *bain* or complete divorce to thyself), and this view of Mahomed, on whom be peace, has been acted upon by most of the Mashaiks.

(But continues Kazy Khan, taking up the 2nd alternative of the case from the beginning of paragraph 1729) If the proposal comes from the woman, she saying, "Give the *Khoola* to me," or "Release me," and the husband saying, "I have done so;" this and the case where the proposal comes from the husband (as at the beginning of 1729) are similar in regard to the three forms mentioned above.

2630. (1730.) A man makes *Khoola* with his wife in consideration of the dower due to her from him; it then appears that nothing was due to the wife from the husband: it is obligatory on the wife to return the dower; just as if a person sells something to the purchaser, the consideration being a debt due to the purchaser from the seller and subsequently both confirm each other that no debt was due to the purchaser from the seller (at the time of the sale); the sale shall be good for an amount equal to the debt, such amount being recoverable from the purchaser: and just as if the husband says, "I have made *Khoola* with thee in consideration of thy slave who is in my hands," or "in consideration of furniture (*Muta*) belonging to thee, which is in my hands;" and it appears afterwards that the wife has nothing in the hands of the husband, the *Khoola* shall be effective in consideration of her dower, so that if the dower is due from the husband, then it will drop, and if the wife has realised her dower from the husband, she shall be bound to return what she has realised.

2631. (1731.) And if the husband makes *Khoola* with his wife, in consideration of the dower due from the husband, or if he divorces her in

consideration of dower due from him, and the woman accepts the same, and the husband knows perfectly well that no dower is due to the wife from him: one complete (*bain*) divorce shall be caused without the wife being bound to pay anything in the case of the *Khoola;* and in the case of the divorce in consideration of the wife's dower, one reversible (or *Rujue*) divorce shall be caused; because when the husband knew that the wife's dower was not payable by him, then he had the intention to cause a divorce, and, therefore, the divorce shall be caused without consideration being payable (and therefore a reversible divorce shall be caused), just as if a husband makes *Khoola* with his wife in consideration of wine or pork, or in consideration of a thing which is of no value (in which case a divorce shall be caused and no consideration shall be payable); and just as in the case of a man who makes *Khoola* with his wife in consideration of the furniture (*Muta*) which belongs to her in "this" house, the husband fully knowing that the wife has no furniture in the house, when *Khoola* shall be caused without anything being payable (on account of the consideration); and just as in the case of a man who sells a thing in lieu of a debt due to the purchaser from the seller, and the seller knows that no debt is due to the purchaser from him, in which case Sheikh-ool Imam known as Khahir Zada, on whom be peace, says, that the sale shall not be valid (see paragraph 1798, *post*).

2632. (1732.) A man marries a woman for a stipulated dower; he then divorces her irreversibly (*bain*—that is, completely) after having had sexual intercourse with her (so as to necessitate a fresh marriage) and then marries her a second time for a separate dower, and afterwards the woman asks for a *Khoola* from him in consideration of her dower; then the husband shall be released from the dower which was fixed at the second marriage, but he shall not be released from the dower fixed at the first marriage.

So also if the wife (so married a second time as aforesaid) says in Persian, "I have purchased myself from thee in lieu of the dower and in lieu of all rights which I have against thee," the husband shall not be released from the dower fixed at the first marriage.

2633. (1733.) When the wife makes a gift to her husband of a moiety of her dower or more or less, and then she gets *Khoola* from him in consideration of some ascertained property before the husband has had sexual intercourse with her, the husband shall be entitled (only) to the consideration for the *Khoola,* neither party shall be entitled to claim

anything according to Aboo Haneefa, on whom be peace (see paragraph 1714); but according to his two disciples, this *Khoola* (in lieu of ascertained property) is tantamount to divorce (in consideration of property) as regards its effect on the dower (see paragraph 1718); and (according to the two disciples) if she makes a gift of a moiety of her dower before taking possession of her dower, and then the husband divorces her before having sexual intercourse with her, no party shall be entitled to claim anything from the other; and this rule holds good in the case of a *Khoola*; but if the woman gets hold of her dower, and then she makes a gift of a moiety of her dower to her husband, surrendering such moiety to him, and the husband afterwards divorces her before having sexual intercourse with her, the husband shall be entitled to recover a moiety of the dower from her; so also (according to the two disciples) in the case of *Khoola* shall the husband be entitled to get back a moiety of the dower from her.

2634. (1734.) And if a man marries a woman for a thousand dirhems, and the wife then makes a gift to the husband of a moiety of her dower, or more or less, and gets possession of the rest, and then the wife gets a *Khoola* in consideration of some indeterminate property; as for instance, if she gets *Khoola* in consideration of cloth or an animal, for which she is to be liable: the *Khoola* is valid, and the husband shall be entitled to claim from the wife whatever of the remaining dower she has got hold of, and the husband shall not be entitled to claim from the wife what she made a gift of to the husband (as aforesaid); because when the consideration for the *Khoola* is an indeterminate thing, then as a consequence of the *Khoola*, the wife is bound to return the dower, and, therefore, what the husband has received out of the dower as a gift shall be considered as having been received by the husband by reason of the *Khoola*, (and therefore the husband shall not be entitled to claim from the wife what she has made a gift of to the husband) and, therefore, the husband shall claim from the wife what the latter took possession of. And the wife shall not by reason of the *Khoola* (in consideration of an indeterminate thing) be relieved from surrendering what she has got hold of, according to Aboo Haneefa, on whom be peace, because the consideration for the *Khoola*, cannot be surrendered to the husband on account of the vagueness of the consideration, and therefore it is obligatory on her to return the profits of her person (such profits consisting of intercourse, &c.) and she is precluded from doing so by the effect of the

divorce, and, therefore, she shall be bound to return the value of such profits, and that value of the profits is (the whole of the) dower.

2635. (1735.) A man makes *Khoola* with his wife on condition of her returning to him whatever she (has got from him and) obtained possession of from him, but the woman has already sold what she got possession of from him, or has made a gift thereof to a person and surrendered the same to that person, so that she is unable to return the same to her husband: she shall be bound to make good to the husband the value of what she got possession of, if the same was of a nature which has value (*Zawat-ool Kyum*, that is, of which damages are paid in reference to its value); but if the same is of a kind which has a similar (that is, as regards which in cases involving liability to damages, a similar must be returned) then she shall be bound to return that similar.

2636. (1736.) A man makes *Khoola* with his wife in consideration of her slave, but the slave is found to belong to somebody else: she shall be bound to make good the value of the slave to her husband.

So also (the value of the slave is payable) if the husband makes *Khoola* with his wife in consideration of somebody else's slave, and the master of the slave does not permit the matter.

2637. (1737.) And if the husband makes *Khoola* with his wife, in consideration of whatever furniture (*Muta*) might be in her room; then if there is furniture belonging to her in the room, the husband is entitled to the same; if not, then the woman shall be bound to return whatever she has got possession of out of her dower.

2638. (1738.) And if the husband makes *Khoola* with his wife, in consideration of whatever thing there might be in her room (whether it is furniture or not, whatever might be the value thereof); then if there is nothing in the room, the *Khoola* shall be operative according to us without any consideration (that is, one irreversible divorce shall take place) whether the thing (in the house) might be described (with certainty), by the use of *alif* and *lam* (the description by means of the letters *alif* and *lam* implying definiteness and being with reference to some thing in the room) or without such *alif* and *lam* (that is, the description being "for anything in the room.") So also if the husband makes *Khoola* with his wife "For whatever might be in her room," and it turns out that there is nothing in the room.

2639. (1739.) And if the wife gets *Khoola*, in consideration of fruit on her date trees, then the *Khoola* is valid, and he is entitled to what fruit there are on the date trees, whether the fruit be large or small in quantity: but if there is no fruit on the date trees, then she shall be bound to return her dower.

2640. (1740.) And if the husband makes *Khoola* with his wife, "In consideration of the fruit that her date trees will produce this year," the *Khoola* shall be valid, and Aboo Yusoof, on whom be peace, was at first of opinion that if the trees should produce fruit, the husband shall be entitled to such fruit; and if the trees should not produce fruit, the *Khoola* shall be valid without anything by way of consideration; just as in the case of a man who makes *Khoola* with his wife, in consideration of what might be in the womb of the wife's female slave or in that of her she-goat, in which case, if there be a child or a kid in the womb, the *Khoola* shall operate on the child or the kid (*i.e.*, the consideration would be the child or the kid); but if there is nothing in the womb, then the *Khoola* shall be operative without anything (being paid by way of consideration): but Aboo Yusoof subsequently altered his view and laid down that the woman shall be bound to return the dower made over by the husband to her (that is, in the case of the *Khoola* being for fruit of the year) and the husband shall have no right over the fruit, because the thing pointed out (that is when the woman says, "In consideration of *the fruit* which the trees will produce this year") is of no effect (*Lugho*) by reason of the absence of the thing on which the expression would operate, and therefore the case is the same as if the man were to make *Khoola* with his wife, "For property," (a vague and indefinite expression), and therefore the woman shall be bound to return her dower: and in the case of the "child" also the thing pointed out (or mentioned) becomes of no effect in consequence of the child not being in existence, and what remained is the expression, "Whatever there might be in the womb;" and the expression "Whatever might be in the womb," includes property (in case in which there is real pregnancy) and what may not be property (in case in which the pregnancy is illusory; and therefore in such a case, the *Khoola* shall be in consideration of the dower).

2641. (1741.) And if the husband makes *Khoola* with his wife in consideration of the dirhems in her hand: this *Khoola* is valid, and then it should be seen if in her hand there are three or more dirhems, then the husband shall be entitled to the same; but if she has no dirhems at all

in her hand, she shall be liable for three dirhems just as if the husband makes *Khoola* with his wife, "in consideration of dirhems;" but if she has in her hands one or two dirhems, then the husband shall get the complete number three (because the least that is indicated by the plural number is three).

And this is contrary to the case where a man marries a woman for "dirhems," in which case the woman shall be entitled to the proper dower (or *Meher-i-Misl*; because dower cannot be less than ten dirhems).

2642. (1742.) And if the husband makes *Khoola* with his wife in consideration of "a slave" or "cloth;" then if the same is certain, the *Khoola* shall be valid, and the husband shall be entitled to the same; but if the slave is not certain, then the husband shall be entitled to a slave of medium value; and in the case of "cloth" or "animal," the divorce shall be caused and the wife shall be bound to return the dower (see paragraph 1734).

2643. (1743.) A man says to his wife, "Thou art divorced thrice, *when* (*Iza*) thou shalt give me a thousand" or "at the time that (*Muta*) thou shalt give me a thousand," and the woman accepts the same: the divorce shall not be caused before the wife gives the thousand; and if she pays the thousand at the same meeting or at another meeting, the divorce shall be caused; but if he says, "Thou art divorced *if* (اِن) thou pay me a thousand," then the divorce shall take place in the event of the payment being made at the same meeting.

2644. (1744.) A woman says to her husband, who has already twice divorced her, "Divorce me thrice, on condition that thou shalt get from me a thousand dirhems," and the husband divorces her once: the woman shall be bound to make good the whole of the thousand dirhems.

2645. (1745.) A woman says to her husband, "Divorce me once in consideration of a thousand dirhems," and the husband says to her, "Thou art divorced once and once and once:" three divorces shall take effect; one divorce shall take place in consideration of the thousand (because that one is *Kusdy* or intentional and of the same character as was asked for) and two divorces shall be caused without any consideration according to all (that is, Aboo Haneefa and his two disciples).

2646. (1746.) And if the wife says to her husband, "Divorce me once in consideration of a thousand," and the husband says, "Thou art divorced thrice:" the woman shall become thrice divorced without (being liable to pay) any consideration, according to Aboo Haneefa, on

whom be peace (who says that although three involves one, still this one is *Zimnee* or one found involved in three, and what the woman asked for was one *Kusdy* or an intentional one); but his disciples have held that one divorce shall take effect in consideration of the thousand, and two divorces shall take effect without any consideration.

2647. (1747.) And if the woman says to her husband, "Divorce me once in consideration of a thousand," and the husband says to her, "Thou art divorced thrice in consideration of a thousand:" the effect of this shall depend on the acceptance by the woman; and if she accepts the same, three divorces shall be caused in consideration of the thousand; and if she does not accept the same, then no divorce shall be caused.

2648. (1748.) A man says to his wife, "Take thy *Khoola* and make *Khoola* of thy person from me, in consideration of dower and the maintenance during the *Iddut*;" the husband then teaches her to repeat in the Arabic language, and to say, "I have taken *Khoola* from thee in lieu of the dower and the maintenance during the *Iddut*, and I have released thee from the dower and the maintenance during the *Iddut*," she not knowing the meaning (or object) of the expression: the learned lawyers have differed in this matter; some of them have said, if the husband, after the wife has said "I have taken *Khoola* from thee in lieu of the dower and the maintenance during the *Iddut*, and I have released thee from the dower and the maintenance during the *Iddut*," says, "I have permitted (or ratified) this and accepted the same," then the *Khoola* shall be valid; but if the husband does not say so, then the *Khoola* shall not be valid, but the husband shall be relieved from the dower and the past maintenance; because the husband's address to the woman, saying, "Take thy *Khoola* in consideration of the dower and the maintenance," is either *Tufweez* or entrusting her with power to make *Khoola*, or *Toukeel*, that is, constituting her his Vakeel to make *Khoola*, and the same (*i.e.*, *Tufweez* or *Toukeel*) would not be established without the woman knowing the meaning; therefore (in the present case, when she does not know the meaning of the expression) when she says, "I have made *Khoola* from thee of my person in consideration of the dower and the maintenance," this shall be considered as the beginning of a sentence for the first time emanating from the woman, and ignorance does not prevent this expression from amounting to a new sentence for the first time emanating from the woman, because ignorance does not prevent the operation of a release, just as ignorance does not prevent the operation of divorce and emancipation

and making a slave a *Moodubbar*, when Arabic expressions are used, although the person employing those expressions, does not know the meaning of the same (*i.e.*, divorce, emancipation, &c.): and therefore when, after the woman has so expressed herself (in the matter of *Khoola*) the husband accepts the same, the *Khoola* shall be valid; but if he does not accept the same, no *Khoola* shall be caused.

And others have held that the *Khoola* shall not be valid, and the husband shall not be relieved from the liability to the dower and the maintenance, although there might be acceptance on behalf of the husband when the woman does not know the meaning of the words; because *Khoola* is, so far as the woman is concerned, tantamount to (*Mowazaat* or) making a return, and therefore the *Khoola* shall not be valid without her knowledge (of the meaning of the words), just as a sale and the like: and release from the dower and the maintenance (cannot be used as an argument to justify the validity of the *Khoola* in such a case, because such release) admits of being set aside (*Fuskh*) and the same might be rendered void by the refusal (of the husband) and therefore release cannot be equivalent to divorce and emancipation.

2649. (1749.) A man says to his wife, "I have made *Khoola* of thy person from me in consideration of so much;" and the woman says, "I have made *Khoola*" or says, "I have done so:" the learned lawyers have differed in this matter; some of them have held that the *Khoola* shall be valid; and others have held that the *Khoola* shall not be valid, when the husband does not accept the same; and the reliable view is that if the husband intends to establish (*Tuhkeek*) the *Khoola*, and not merely to give expression to an intention (which he might carry out or not—*Soum*), then the *Khoola* shall be valid, not otherwise; because the expression used by the husband admits of being used for the purpose of expressing an intention (to do a thing in future) and it also admits of being used for the purpose of establishing a right; and apparently it amounts to a mere expression of intention (to do a thing in future); therefore, if the husband has the intention to establish *Khoola*, then the *Khoola* shall be valid and not otherwise; because when the husband has an intention to establish the *Khoola*, he, in effect, says, "I have made *Khoola* of thy person from me in consideration of so much, because I have given thee thy *Khoola*" and therefore if the woman says (in answer), "I have made *Khoola*," the *Khoola* becomes complete. (See paragraph 1789 *post*).

2650. (1750.) A woman says to her husband, "Give me *Khoola* in consideration of a thousand dirhems," and the husband says, "Thou art divorced:" the learned lawyers have differed in this matter (whether the same amounts to *Khoola* or Divorce); some of them have held that the expression used by the husband amounts to an answer, and the *Khoola* becomes complete; whilst others have held that divorce shall take place and the expression ("Thou art divorced") shall not constitute *Khoola*: but the preferable view is that the husband's expression shall amount to an answer (and therefore there shall be a valid *Khoola*); because the same is an answer to all appearance; and if after this the husband says, "I did not intend to give an answer by that expression," the word to be accepted shall be that of the husband, and divorce shall take effect without the wife having to pay anything.

So also if the wife says to her husband, "I have taken *Khoola* from thee" and the husband says to her, "I have divorced thee:" some of the learned lawyers have held that the husband's expression is by way of an answer, and the *Khoola* shall be complete between them; whilst others have held that one reversible (*Rujue*) divorce shall take place; whilst still others have held that the husband shall be asked as regards his intention; and if he says, "I intended answer thereby," then the expression shall amount to an answer (and there shall be a valid *Khoola*).

And in the first case (*i.e.*, the case at the commencement of the paragraph) also it is fit that the husband shall be questioned regarding his intention (See paragraph 1794 *post*).

2651. (1751.) A woman with whom her husband has had sexual intercourse, asks her husband to divorce her; the husband says to her, "Release me from all thy rights upon me, so that I may divorce thee;" the woman says, "Verily have I released thee from every right which women have against men;" the husband then says promptly after this, "I have divorced thee once:" the learned lawyers have said that one irreversible (*bain*—that is, complete) divorce shall take place; because the husband divorced her apparently in consideration of the release (and when divorce is for consideration, then it is *bain*).

2652. (1752.) A woman after her husband has had intercourse with her takes *Khoola* from him in consideration of (specific or certain) property; the woman then increases the consideration for the *Khoola* after the *Khoola*: this increase of the consideration for the *Khoola* is not valid (although increase is valid in the case of dower).

2653. (1753.) A woman takes *Khoola* from her husband in consideration of "all rights which she has upon him:" she shall (still) be entitled to maintenance, as long as she remains in the *Iddut*; because the maintenance during the *Iddut* is not her right at the time of the *Khoola* (but on the contrary, the right to maintenance arises after the *Khoola*, and what she gave up by the expression used by her relates to her present right and not future right).

2654. (1754.) A number of people (*koum*) come to a man and tell him that his wife has appointed them as her Vakeel to obtain *Khoola* from him; the husband then makes *Khoola* with the wife through them, in consideration of a thousand dirhems; the woman then denies having appointed those people as her Vakeel: then if those people stand surety to the husband for the property (given in consideration) the divorce shall be caused, and the consideration shall be due from them; because when the woman denies the appointment as her Vakeel, then the *Khoola* made by the husband remains as a *Khoola* with a volunteer (or *Fuzoolee*), and when the *Fuzoolee* makes proposal to the husband for obtaining a *Khoola* and stands surety for the consideration, he, the *Fuzoolee*, becomes (on account of such suretyship) a principal party himself, and therefore the *Khoola* shall be complete in consequence of the acceptance by the husband: but if those people have not stood surety for the consideration of the *Khoola*, then the *Khoola* shall depend on the permission of the wife and on her acceptance (because she alone remains the principal party) and that acceptance is not found (and is wanting): and if the husband claims that the woman did verily appoint those people as her Vakeel, the divorce shall be caused by the admission of the husband, and no consideration shall be payable (either by the wife or by the people). This is when those people obtain *Khoola* from the husband.

But if the husband sells to those people one divorce (to be given to his wife) in consideration of a thousand dirhems, the learned lawyers have differed in regard to the matter (whether the people shall be liable for the consideration). Abool Kassim Suffar, on whom be peace, says that divorce shall be caused, and those people shall be bound to deliver the property (offered in exchange for the divorce), although those people might not have stood surety; because words of purchase (when those people used the words, "We have purchased,") are words of suretyship, inasmuch as the transaction of purchase amounts to a transaction of

exchange (in which after contract, each party is bound to perform what he has undertaken).

And Aboo Bakur of Balkh, on whom be peace, has said, this case (in which the husband expresses himself as aforesaid) is like the case of *Khoola* (mentioned at the beginning of this paragraph): and this view is correct (see Futawai Alumgeeree, Vol. I., page 684).

2655. (1755.) A man says to another, "divorce my wife;" then the person so ordered gives *Khoola* to the wife, in consideration of her dower and maintenance during the *Iddut*, or divorces her for such consideration (and the woman accepts the same): the lawyer Aboo Jaffer, on whom be peace, says, the said *Khoola* or divorce so given is valid, whether the woman is one with whom the husband has had sexual intercourse or not. And Aboo Bakur Iskaf, on whom be peace, says, that this shall not be valid, and the divorce (and *Khoola*) shall not be caused; and he makes no distinction between the case of one with whom her husband has had sexual intercourse and between one with whom her husband has not had sexual intercourse. And it is also reported from him that he said, that if the woman is one with whom her husband has had sexual intercourse, then the *Khoola* or divorce shall not be valid, but if she is not one with whom her husband has had sexual intercourse, then the *Khoola* or the divorce shall take place.

And this is also the view taken by Abool Kassim Suffar, on whom be peace, and this view is correct; because the divorce of one with whom her husband has not had sexual intercourse, is irreversible (*bain*—that is, complete); and if the husband is inclined to divorce irreversibly (or *bain*) without consideration, he shall be much more willing to do so when he gets consideration for the same; but in the case of the woman whose husband has had sexual intercourse with her, divorce (which is not of the *bain* class) without consideration is not irreversible (or *bain*), and does not cut off (before the expiry of the *Iddut*) the relationship created by marriage, and, therefore, the husband never agreed to have the wife irreversibly (*bain*) divorced, and therefore the divorce pronounced by the other man (which in consequence of its being accompanied with consideration obtained the character of being irreversible or *bain*) is not operative as against the husband (*i.e.*, it shall not amount to divorce at all).

2656. (1756.) A man says to another, "Divorce my wife on condition that she shall not remove anything from the house" the person

so ordered then divorces the wife; the husband and wife then come to differ from one another, the husband saying that the woman did (subsequent to the pronunciation of the conditional divorce) remove a thing from the house, and the wife saying that she did not: it is stated in the Nuwadir that the word to be accepted shall be that of the husband, and that the divorce shall not be caused: the learned lawyers have held that this answer is correct if the husband has said to the other person whom he has ordered as above, "Tell her 'thou art divorced if thou shalt not remove anything from the house,'" so that if the person so ordered did say this to the woman, and if the husband afterwards claims that the woman took some thing out of the house, then the word to be accepted shall be that of the husband, because the husband denies (that) the condition of the divorce (has been fulfilled); but if the husband said to the person ordered, "Tell my wife, 'thou art divorced, on condition (of thy accepting that) thou shalt not remove any thing from the house'" (so that the divorce is conditional on her accepting the condition and not on her refraining to remove a thing), and the person so ordered does say so, and the woman accepts (the condition), then if the husband afterwards says that the woman removed some thing from the house, the husband's word shall not be accepted, because in this case, the divorce appertains to the acceptance by the woman (of the condition that she shall not remove) and when she does accept (the condition) the divorce takes place at once whether she removes any thing from the house or not; just as if the husband says to his wife, "Thou art divorced on condition (of thy accepting) that thou shalt pay me a thousand dirhems" and the woman says, "I accept," she shall become divorced at once even if she does not pay the thousand.

So also if a man says to his wife, "Thou art divorced on condition (of thy accepting) that thou should enter the house" and she accepts (the condition), she shall become divorced at once, although she might not enter the house because the word *ala*, (which has been here rendered by the words, "on condition of thy accepting that") is used to make the proposal dependent on the acceptance and not to make the proposal dependent on the existence of the thing (or condition) accepted.

2657. (1757.) A man says to his wife, "Thou art divorced after to-morrow, on condition of (thy accepting to pay) a thousand dirhems and to-morrow on condition of (thy accepting to pay) a thousand dirhems and to-day on condition of (thy accepting to pay) a thousand

dirhems;" the woman says, "I accept;" she shall become immediately divorced once in consideration of a thousand and the second and third divorces shall be caused (if the woman is one with whom the husband has had intercourse), at their respective times, without the consideration mentioned (because the consideration is found without the thing for which the consideration is stipulated).

2658. (1758.) A man says to a woman who is not in the ownership of the man (that is, who is not married to him), "Thou art divorced on condition of (thy accepting to pay) a hundred dirhems, if I shall marry thee any day out of time" and the woman says, "I accept;" the divorce shall not be caused (in the event of his marrying her) according to Aboo Haneefa, on whom be peace, and the woman shall not be obliged to pay anything (because her present acceptance of the condition before the condition is realised goes for nothing) but Aboo Yusoof, on whom be peace, says that the woman shall become divorced (after the marriage), and the payment shall be obligatory on the woman. But if she, at the time of her marriage says, "I accept the divorce which thou did refer to me, in consideration of a thousand dirhems," then the divorce shall be caused, and the woman shall be bound to pay the dirhems according to Aboo Haneefa, on whom be peace.

2659. (1759.) A Vakeel who has been appointed (by the woman to obtain *Khoola* from the husband) shall not be liable to a demand (at the instance of the husband) to make good the consideration, and such consideration shall be due from the woman (if the Vakeel has kept the liability vague and indefinite. See paragraph 1761 *post*).

2660. (1760.) When a messenger sent by the woman says to the husband, "Either divorce her or keep her (with propriety);" the husband says, "I shall not keep her and I shall divorce her;" the messenger then says, "I have released thee from all rights which the woman has against thee and therefore divorce her;" and the husband divorces her; the woman then says, "I did not appoint the messenger as a Vakeel to give release," and the husband claims that she did verily direct the messenger to give release: the divorce shall be caused and the rights of the woman (shall not be lost to her as a consequence of the release, but the same) shall continue to subsist against her husband; but if the husband does not claim that the woman appointed the messenger her Vakeel, then the case is two-fold; if the messenger has said to the husband, "I have released thee from all rights which the woman has against thee, on con-

dition of thy divorcing her," and the husband divorces her for this release, then the divorce shall not be caused, and the rights of the woman shall continue to subsist against her husband, because divorce in lieu of being released from the dower depends on the permission of the woman; and when she has not given the permission, the divorce shall not be caused; but if the messenger says to the husband, "Divorce her, and verily have I released thee from her dower," the divorce shall be caused, and her rights shall subsist against the husband: (in the latter case the divorce is caused because it was independent of the release; in the first case it was dependent on the release: there is no release in either case, because the messenger was not a Vakeel and had no authority from the wife to release, neither was the release authorised or ratified by the wife).

2661. (1761.) When the Vakeel appointed by the woman to obtain *Khoola* accepts the *Khoola*, the *Khoola* becomes complete: then will the Vakeel be liable to a demand in respect of the consideration for the *Khoola*? This case arises in two ways; if the Vakeel has kept the liability for the consideration undefined (that is to say, not having referred it to himself or to the woman) having said to the husband, "Give *Khoola* to thy wife, in consideration of a thousand dirhems," or "in consideration of this thousand" pointing towards the thousand which was the woman's property, then in this case, the consideration shall be due from the woman, and the Vakeel shall not be liable to a demand against him in respect of it; but if the Vakeel has referred the consideration to his person, as one would refer property to one's self, or as one would refer suretyship to himself, having said, "Give *Khoola* to thy wife, in consideration of this my thousand dirhems" or "in consideration of this thousand," pointing to the thousand which belongs to him; or "in consideration of my thousand," or says, "in consideration of a thousand, on condition that I am surety," then in this case the consideration shall be due from the Vakeel, and the woman shall not be liable to a demand upon her in respect thereof; and the Vakeel shall be entitled to realise the amount from the woman either before the Vakeel is made to pay to the husband or afterwards, although the woman might not have ordered him to stand surety for her: but contrary to this is the case of a man appointed Vakeel on behalf of a man to marry him to a woman, for if such Vakeel stands surety for the dower to the woman and the suretyship is without the authority of the client, the Vakeel shall not be entitled to make the client liable.

2662. (1762.) When a man divorces his wife in consideration of property, whilst she is in her *Iddut* (consequent on and) after *Khoola*, the divorce shall be caused, but the consideration shall not be due (because the consideration is stipulated for nothing).

2663. (1763.) So also if the husband divides his wife's dower into three portions, and then divorces her, once in consideration of a third part of her dower, and also gives her a second and third divorce (in lieu of the remaining two-thirds), the three divorces shall be caused, and a third part of the dower shall drop (from the husband and shall form consideration for one divorce) and the woman shall be entitled to recover from the husband two-thirds of her dower (because when the first divorce was given in consideration of a third part of the dower, that divorce became an irreversible divorce having being opposed to consideration; but the second divorce, although operative, shall not carry with it the consideration; because consideration is paid by the woman for being released from the marriage, from which she was completely released by the first divorce, and so as regards the third divorce).

2664. (1764.) A man says to his wife, "I have made *Khoola* with thee;" and she accepts the same: divorce shall be caused, and the husband shall be released from the dower which the woman has owing to her from the husband: and if she has no dower due from the husband, then she shall be bound to return the dower which the husband had delivered to her; so has it been laid down by Hakim-ool Shaheed in the chapter on Ikrar in his work called the Mookhtusur and by Sheikh-ool Imam known as Khahir Zada, on whom be peace: and the same view has been adopted by Sheikh-ool Imam Aboo Baker Mahomed, son of Fazal, on whom be peace. (See paragraphs 1729 and 1809 *post*.)

And this case strengthens the view laid down by us from Aboo Yusoof, on whom be peace, that *Khoola* does not take place except for consideration.

2665. (1765.) A man obtains his daughter's *Khoola* from her husband; if the daughter is of age, and if the father has stood surety for the consideration for the *Khoola*, then the *Khoola* is complete; because if a stranger (or a *Fuzoolee*) does so (that is, obtains *Khoola* and stands surety for the consideration; see paragraph 1754), the *Khoola* becomes complete, and, therefore, shall the *Khoola* be much more complete in the case of the father: and if the father obtains the *Khoola* in consideration

of his daughter's dower, and stands surety, then also shall the *Khoola* become complete: and after that it will be seen, if the woman ratifies the *Khoola* in lieu of dower, her ratification shall be valid, and the liability to dower shall cease; but if she does not ratify, then her dower shall be payable by the husband, and the husband shall make the father liable for the same as a consequence of the suretyship, if the father has said to the husband, "Give *Khoola* in consideration of her dower; if she ratifies this (then all right), if not I shall be responsible to the extent thereof."

But if the daughter is a minor, then, if the father stands surety (for the consideration for the *Khoola*) the *Khoola* shall be complete by virtue of his acceptance, and the dower shall remain due from the husband; but the latter shall hold the father liable; but if the father does not stand surety, then the consideration shall not be leviable either from the father or from the minor, just as if the girl had been of age (and the father had obtained the *Khoola* and nobody had made himself responsible for the consideration, in which case neither the father nor the girl is responsible for the payment of the consideration as shown in the preceding paragraph); and as regards the question whether divorce shall be caused (in the case of the minor daughter when nobody is surety) if the minor (whilst a minor) accepts (the *Khoola*), the divorce shall be caused, just as if the *Khoola* had taken place with the minor herself; but if (in the same case) the father (without being surety for the consideration) accepts the contract of the *Khoola* (instead of the minor accepting the same), the Mashaikhs, on whom be peace, have differed on the question whether the divorce shall be caused, and the difference arises by reason of the difference in the traditions (from Aboo Haneefa); but the correct tradition is that the divorce shall be caused, because the father's tongue is just like the daughter's tongue.

2666. (1766.) And if the *Khoola* takes place between the husband and the mother of the infant wife (that is, the mother enters into the contract of *Khoola* on behalf of her infant daughter) then if the mother has referred the consideration to her own property (saying that she asks *Khoola* in lieu of her own thousand dirhems) or if she stands surety, the *Khoola* shall be complete, just as if the *Khoola* were made (by the husband) with a stranger (or *Fusoolee*, who appears on the side of the wife); but if the mother does not refer for the consideration to her own property and does not stand surety, will the divorce be operative

as it is operative when the father obtains the *Khoola* (see paragraph 1765)? In this matter there is no tradition (from Aboo Haneefa) and the correct view is that the divorce shall not take place. And if a person who appears as a contracting party (on behalf of the infant wife) in the matter of *Khoola* be a stranger, and does not stand surety for the consideration, will the *Khoola* remain suspended (until the minor ratifies it)? Some of the learned lawyers have said that if the minor wife is able to understand the contract and is able to describe it, then the *Khoola* shall remain suspended till (*i.e.*, dependent on) her acceptance (or ratification); whilst others have said that the same shall not remain suspended till her ratification (but that a divorce shall be caused without consideration).

2667. (1767.) And if the *Khoola* is obtained from the husband by an infant wife, who understands the nature of the *Khoola*, and is able to describe it, in consideration of her dower, then one irreversible (*bain*, or complete) divorce shall take place, and the dower shall not cease to be payable; (because giving up dower is purely detrimental to her and is in no way to her benefit).

2668. (1768.) And if the infant wife appoints a Vakeel to get *Khoola* (from her husband) and the Vakeel acts in the matter, then on this question there are two traditions; according to one tradition, the appointment of the Vakeel is valid and the *Khoola* is completed by the acceptance of the Vakeel, just as it is completed by the acceptance of the infant wife; and according to another tradition, when the Vakeel does not stand surety for the consideration (for the *Khoola*), no divorce shall be caused, just as if the *Khoola* had been made by the husband with a stranger (for the wife).

2669. (1769.) And Khussaf, on whom be peace, has stated in the (book on) Devices, that if the father obtains his infant daughter's *Khoola* in consideration of her dower, then if the father is aware that the *Khoola* is for the good of the daughter, in that she does not pass her days in harmony with her husband, and therefore he obtains her *Khoola*, in consideration of her dower, then, according to the view of *Malik*, on whom be peace, the husband's liability to dower shall drop; and if the Kazee decrees that the dower has dropped (*i.e.*, has ceased to be payable), then his decree shall be operative, because the decree of the Kazee relates to a question which (has not been settled by express text, but which) has been settled by *Ijtihad*.

2670. (1770.) And it is valid to pledge property (with the husband) to secure the consideration for the *Khoola*, and also to give surety (*Kifalut*) for such a purpose.

2671. (1771.) So also it is allowable to fix a time for the payment of the consideration for the *Khoola;* and if the time fixed is the death of so and so, or until so and so arrives from his journey, the consideration shall become immediately payable, and the time fixed shall become void (because the time fixed is *Mujhool* or vague): and if the time fixed is the reaping of the crops or the thrashing of the crops, then the time fixed is valid.

2672. (1772.) When the father makes *Khoola* on behalf of his infant son, the *Khoola* is not valid, because this act of the father amounts to making the divorce dependent on (the son's) acceptance, and, therefore, it shall not be valid just as the *Khoola* made by the infant husband himself is not valid: and the *Khoola* made by the infant husband does not depend on the ratification by the father.

2673. (1773.) And the *Khoola* made by a drunken man is valid; so also all his acts of disposition (are valid), except his apostacy and his admission of an act involving punishment and his calling witnesses to attest his own testimony, (*e.g.*, "you be witness that I have witnessed Zyd divorcing his wife"). And Daud of Isfahan, on whom be peace, says, that no act of disposition by one who is drunk is operative, and such also is the view taken by Husun, son of Zyad, and Abool Hussun Kurkhy and Abool Kassim Saffar; and this view is one of two views taken by Shafei, on whom be peace. And Aboo Nusur, son of Mahomed, son of Sulam, on whom be peace, says, that if the man who is intoxicated is helpless in the matter of drink in this way that (without drink) his senses are not about him, or if compulsion is exercised on him, then divorce given by him shall not be caused, and his acts of disposition shall not be valid; but if he is not helpless in the matter of drink (as aforesaid), then the divorce given by him shall take effect and his acts of disposition shall be operative.

And according to another tradition (from Aboo Haneefa) there is *Kyas* and *Istihsan* (*i.e.*, the rule in such a case is inferred both from *Kyas* and *Istihsan*), and according to *Istihsan*, the *Khoola* is not valid; and according to *Kyas* it is valid. And it is reported from Aboo Yusoof,

on whom be peace, that he accepted the view which was inferred from *Kyas* (by Aboo Haneefa).

And if the Kazee adopts the view set forth by any one of these here mentioned, his decree shall be operative.

2674. (1774.) A man makes *Khoola* with his wife, and they have an infant child, the condition for the *Khoola* (that is, the consideration) being that the child shall remain with the father for a certain number of years: the *Khoola* is valid but the condition is void; because the right to remain with the mother appertains to the child, and that right shall not become void by the mother rendering the same void.

2675. (1775.) A woman takes *Khoola* from her husband for the consideration of her dower and the maintenance for the period of her *Iddut*, and on the condition that she shall maintain her child with her own (means of) maintenance (that is, that she shall herself maintain her) for a certain number of years; she does keep and maintain the child for a year or two (that is, short of the stipulated number of years), and then sends back the child to the husband: the woman shall be compelled to keep the child and maintain the child herself with her own maintenance for the remainder of the stipulated period. And if the woman runs away and conceals herself, so that the stipulated period becomes completed, and the woman then appears, the husband shall make the woman liable for the value of the child's maintenance during the time the woman did not maintain the child.

2676. (1776.) So also if a man divorces his wife on condition that the woman shall keep and maintain the child with her own maintenance until the child attains majority, and on condition that the woman shall give up her dower due from the husband, and the woman accepts all this; she then refuses to keep the child: she shall be compelled to keep and maintain the child with her own maintenance; but if (notwithstanding that), the woman fails to do so, she shall be bound to pay for the keeping (or the bringing up) of the child and its maintenance, until the child attains majority.

2677. (1777.) A woman gets *Khoola* on condition that she gives up maintenance and residence: the *Khoola* shall become complete and the woman shall have no right to maintenance, but her right of residence shall not be void.

2678. (1778.) If the wife gets her *Khoola* from her husband on condition that the charge for residence shall be on her, she shall be bound to hire a house from her husband or from another person and observe her *Iddut* there.

2679. (1779.) A woman takes *Khoola* from her husband on condition that she shall maintain her child by him as long as the child lives: Aboo Haneefa, on whom be peace, says, that (instead of being bound by the stipulation to maintain the child on account of such stipulation being vague or *mujhool* as regards period) the woman is bound (as a consequence of the *Khoola* under such circumstances) to return the dower which she has taken possession of. (Compare paragraph 1782 where the period of maintenance being fixed, there is no vagueness in the consideration).

2680. (1780.) A woman gets *Khoola* from her husband in consideration that "she shall suckle the child in her womb for two years until the child is weaned and in consideration that the maintenance of the child shall be on her for ten years after the suckling period, on condition that if she gives birth to a still-born child, then the husband shall not have anything to recover from the wife, and that if she gives birth to a live child and suckles it for one year and the child then dies, then the husband shall not have anything to recover from her:" Aboo Yusoof, on whom be peace, says, that all those stipulations are valid, and that the woman shall have secured to her whatever is saved on account of the suckling and maintenance of the child should the child die or should it be born dead (that is, the husband shall have no right to get back the proportionate costs of suckling and maintenance).

And Zoofur, on whom be peace, says, that all those stipulations are *fasid* (or invalid) and that the woman shall be bound to return the dower to her husband (as a consequence of the *Khoola*, regardless of the consideration and condition stipulated for).

2681. (1781.) A woman gets *Khoola* from her husband for the consideration that she shall make over her dower to her child, or for the consideration that she shall make over her dower to so and so, a stranger. Mahomed, on whom be peace, says, that the *Khoola* is valid, and that the husband shall get the dower, and nothing shall go to the child or to the stranger.

2682. (1782.) A woman gets her *Khoola* from her husband for the consideration of her suckling her child without fixing any time (as the period of suckling): Mahomed, on whom be peace, says, that the

Khoola shall be valid for the consideration of the period of suckling being for two years.

2683. (1783.) If the husband makes *Khoola* with his wife for the consideration that she shall suckle the child for two years and for the consideration of her maintaining the same child for ten years. Mahomed on whom be peace, says, that this *Khoola* shall be valid, and the (small) amount of vagueness that might here exist (owing to the possibility that the child might die before twelve years) can be suffered to exist in cases of divorce.

2684. (1784.) A woman appoints a man as her Vakeel to get *Khoola* from her husband; she then resiles from the appointment (that is, she then withdraws the authority and dismisses him before the *Khoola* is obtained): the withdrawal of authority shall not be effectual, when the Vakeel does not know the fact (that his power has been taken away from him).

2685. (1785.) If the woman sends a messenger to her husband to get *Khoola* from him, and she withdraws the message before the messenger delivers the message, it is valid for her to do so, although the messenger might not be aware of the withdrawal by her; (because even if the messenger makes the proposal and the husband assents to it, still the contract is not completed until she again herself expresses her agreement).

2686. (1786.) A man says to two men, "Give *Khoola* to my wife without any consideration," and one of them makes *Khoola* with the wife: the divorce (involved in the *Khoola*) shall not be caused (because when two Vakeels are appointed, one has no authority to act singly).

2687. (1787.) If the husband orders two men to give *Khoola* to his wife in consideration of one thousand; then one of them says, "I have given *Khoola* to her for a thousand," and the other man says, "Verily do I ratify this:" Aboo Yusoof, on whom be peace, says, that the *Khoola* shall not be valid; but if one of them says, "I have given *Khoola* to her in consideration of a thousand" and the other man also says, "I have given *Khoola* to her in consideration of a thousand," this *Khoola* is valid (because both do the same act: and joint action is not necessary, as such action is not stipulated for in the authority).

2688. (1788.) A woman appoints another man a Vakeel so that he might obtain her *Khoola* from her husband in consideration of a thousand dirhems; and the husband also appoints the same man as his Vakeel to give *Khoola* to her on behalf of the husband for the consideration of a

thousand; the Vakeel then makes the *Khoola* in consideration of a thousand: it is laid down somewhere (by Mahomed) that this *Khoola* shall not be complete until the woman accepts the *Khoola* after the Vakeel has made the *Khoola*, or until the husband accepts the same and permits it (because one and the same man cannot appear as Vakeel for the purposes of *Khoola* for both parties, and, therefore, if one party ratifies the Vakeel's act, then the Vakeel has, in effect, acted as a volunteer for that party, and the result of the ratification of one party is as if that party had himself entered into the transaction; after this the Vakeel can appear for the other party): Mahomed says that the same man cannot act as the Vakeel of both parties; and Hakim-i-Shaheed (the author of the Moontuka) on whom be peace, says, that this view is in accordance with what is stated in the Asul.

Section II.

ON KHOOLA BY THE USE OF WORDS OF SALE AND PURCHASE.

2689. (1789.) When a man says to his wife, "Hast thou purchased from me" or "bought from me, three divorces in consideration of thy dower and the maintenance during the period of thy *Iddut;*" and the woman says, "I have purchased:" the correct view is, that the divorce shall not be caused, until the husband, after the woman has expressed herself, says, "I have sold to thee;" because the man's expression admits of being (viewed as a feeler or) a (mere) expression of intention (which he might carry out himself or not) and also admits of being used in order to establish a thing, and, therefore, the *Khoola* shall not be complete by her expression, "I have purchased."[1] And verily like reason has already been set forth (see paragraph 1749) when considering the man's expression to her, "I have made *Khoola* with thee."

And if the husband says to the wife, "Purchase three divorces in consideration of thy dower and the maintenance during the period of thy *Iddut,*" and the woman says, "I have purchased:" the *Khoola* shall become complete between them; because the husband's expression used in the imperative amounts to *Tufwees* (or entrusting) to her (of the power of sale on behalf of the husband) and it is competent to one (of the two sponses) to appear as a contracting party on behalf of both parties in the matter of *Khoola* in the event of the consideration being known, according to correct traditions, (from Aboo Haneefa); and, in the present case, the consideration is known.

But in the first mentioned case, the husband's words do not amount to *Tufweez* (or the entrusting the wife with the power of sale on behalf of the husband), and, therefore, in that case one (of the two spouses) cannot contract on behalf of both parties; and, therefore, it is necessary for the husband, after the wife has expressed herself, to say, "I have sold."

2690. (1790.) A man says to his wife, "Every woman whom I shall marry, I have verily sold her divorce to thee in consideration of one dirhem;" he then marries a woman: it is necessary that the (first) wife should express her acceptance after this second marriage of her husband, at the meeting at which she becomes aware of the second marriage; and if she, after such second marriage, says, "I have accepted" or says, "I have purchased" or says, "I have divorced her (that is, the second wife)," the divorce on the second wife shall take place for what the husband stated as the consideration (that is, in this case the first wife shall have to pay one dirhem to the husband); but if the first wife accepts the sale before the (second) marriage, no divorce shall be caused; because the expression used by the husband shall be referred to a time after the marriage (that is, after the marriage has taken place, the husband must be held to say, "I have sold her divorce to thee for one dirhem,") and, therefore, acceptance to be valid must be after the marriage.

2691. (1791.) A man says to his wife, "I have sold to thee three divorces in consideration of thy dower and the maintenance of the period of thy *Iddut*," and the woman says, "I have *sold*," instead of saying, "I have purchased:" Aboo Buker Iskaf, on whom be peace, says, one irreversible (or *bain*, that is, complete) divorce shall be caused just as if the woman had said, "I have sold my dower and the maintenance for the period of my *Iddut* in consideration of the divorce."

And the lawyer Abool Leith, on whom be peace, has said that no divorce shall be caused: and this view is preferable; because the woman's expression is (an independent sentence and) the commencement of a sentence, and is not by way of an answer.

2692. (1792.) A woman says to her husband, "I have sold to thee my dower and the maintenance of the period of my *Iddut;* hast thou purchased;" and the husband says, "I have purchased; get up (and) go away;" the woman then gets up and goes away: the learned lawyers have held that apparently the woman shall not become divorced; because the husband

did not sell to her the person of the woman and her divorce, but he only purchased her dower, and the purchase of the dower does not amount to divorce: but the learned lawyers have held that it is safe to renew the marriage (with the woman), if he has not already divorced her twice before this.

2693. (1793.) A man says to his wife, "I have sold to thee one divorce in consideration of thy dower and the maintenance of the period of thy *Iddut*;" and the woman says (in Persian), "With all my heart have I purchased (the same):" divorce shall be caused; because this expression (*viz.*, such as that used by the wife saying, "with all my heart,") is used for the sake of exaggeration (to express the highest degree of desire) and the expression amounts as if she had said, "I have purchased with pleasure."

2694. (1794.) If the husband says to her, "I have sold to thee the divorce in consideration of thy dower, which is owing to thee from me," and the woman says, "I have divorced myself:" the woman shall become completely separated (*bain* or irreversibly divorced) by one divorce in consideration of her dower; because this expression (that is, the one used by the woman) admits of being used by way of acceptance of the proposal emanating from the husband, and, therefore, that expression shall be considered as an acceptance. And some have said that one reversible divorce shall be caused.

And this case is an illustration of the case where, if the woman says, "Give me *Khoola*, in consideration of a thousand dirhems," and the husband says, "Thou art divorced," the learned lawyers have differed in regard to this case, but the correct view is that the husband's expression shall be held to be used as an answer to the woman's proposal (see paragraph 1750). So also in the present case.

And if the husband says to his wife, "I have sold to thee one divorce," without mentioning the consideration, and the woman says, "I have purchased," one reversible (or *Rujue*) divorce shall take place. And if the husband says, "I have sold thy person to thyself," and the woman says, "I have purchased," one irreversible (*bain*, that is, complete) divorce shall be caused; because to sell the divorce is to make the purchaser (*i.e.*, the wife) the owner of the divorce, and, therefore, when the husband has not mentioned the consideration, he has in effect said, "I have made thee owner of the divorce," (without qualifying the divorce or stating of what kind it is, and a divorce without qualification is always reversible); therefore the divorce shall be reversible (*Rujue*): but to sell

the person of the wife (to the wife) is to make her the owner of her person, and the ownership of the person is not obtained except by an irreversible (*bain*, that is, complete) divorce, and, therefore, the divorce shall be irreversible.

2695. (1795.) A man says to his wife, "I have sold to thee, one divorce in consideration of three thousand dirhems;" he says this three times, the woman, after each time the husband has expressed himself, says, "I have purchased;" the husband then says, "by using the second and third expressions, I intended to repeat myself and to give information of the first expression:" the man shall not be believed by the Kazee, and three divorces shall be caused, and she shall be liable to three thousand dirhems; because when the husband first said, "I have sold to thee one divorce in consideration of three thousand dirhems" and the woman accepted the same, one divorce was caused in lieu of three thousand dirhems, and, therefore, no consideration would be due for the second and third divorces; and the second and third divorces remained as direct divorces partaking of the character of being (*bain*, that is, complete or) irreversible (in consequence of being associated with an irreversible or *bain* divorce).

2696. (1796.) A man says to his wife, "I have sold to thee thy affair (Amr—that is, the authority to divorce thyself) in consideration of a thousand dirhems;" and the woman says at the same meeting, "I have resumed my person (that is, I have divorced myself):" one divorce shall be caused in lieu of a thousand dirhems. But if he says to her, "I have sold to thee this cloth in consideration of thy dower and the maintenance during the period of thy *Iddut*," and the woman says, "I have purchased," and the husband then divorces her, one reversible divorce shall be caused, and the sale of the cloth in lieu of (dower and) maintenance shall be void in consequence of the vagueness of the maintenance.

2697. (1797.) A man sells to his wife one divorce in consideration of the whole of her dower and of the whole of her property, "in the room," except what she has on her person such as her shirt, and the woman says, "I have purchased;" and she has on her person ornaments and many clothes: one irreversible (*bain*, that is, complete) divorce shall be caused in consideration of what is in the room, and the whole of what is on her person, consisting of clothes and ornaments, shall belong to the woman; because the expression, "what is in the room," does not include what is on her person consisting of clothing and ornaments, and, therefore, the husband shall not be entitled to the same.

2698. (1798.) A man sells to his wife one divorce in consideration of what is owing to her from him on account of the dower, and the husband knows full well that no dower is due to her from him: one reversible divorce shall be caused without consideration.

2699. (1799.) A woman says to her husband, "I have purchased my person from thee in consideration of that (divorce) which thou can (or has power to) give me" or says, "I am purchasing my person from thee in consideration of that (divorce) which thou can (or has power to) give me" intending the making of a proposal (by the use of the expression, "I have purchased" or "I am purchasing") and not intending to make a promise (that she will in future purchase it); the husband says, "I have given to thee:" one divorce shall be caused; because what the woman desired from her husband was to get a divorce, and, therefore, her expression in full was as if she said, "I have purchased my person, and therefore give me divorce;" and therefore when the husband said, "I have given," this expression amounted to an answer to what the woman had asked. (See paragraph 1811 *post*).

2700. (1800.) A tribe (or number of people) say to a woman, "Hast thou purchased thy person by one divorce in consideration of all rights which women have against men, such rights consisting of the dower and the maintenance during the period of the *Iddut?*" she says, "Yes, I have purchased;" they then say to the husband, "Hast thou sold" and he says, "Yes:" the learned lawyers have said that the *Khoola* shall become complete, and the husband shall be released from the dower, although the people did not say to her, "Hast thou purchased thy person *from him*;" because the woman could not purchase her person except from her husband.

2701. (1801.) A woman intends to obtain *Khoola*; and a number of people assemble and say to her, "Hast thou purchased thy person in consideration of all rights against the husband;" she says, "I have purchased" and they then say to the husband, "Hast thou sold," and the husband says, "I have sold," and what was passing in his mind was the sale of the furniture of the room: the woman shall verily become divorced so far as the Kazee is concerned; because the husband said, "I have sold" in answer to the question put by the people, and the answer incorporates what is contained in the question.

God knows best.

SECTION III.

ON KHOOLA IN THE PERSIAN LANGUAGE.

2702. (1802.) A man says to his wife (in Persian), "Everything as to which God will question me regarding thee on account of dower, et cetera, I have sold to thee, in consideration of that dower which is thy property," and the woman says, "I have purchased:" the learned lawyers have said that divorce shall not be caused; because the husband sells to her what was her own right, and, therefore, this is not valid; just as if a person says to another, "I have sold to thee this thy slave, in consideration of this my slave."

2703. (1803.) A woman asks for divorce, and the husband says to her (in Persian), "Hast thou sold this gold and house in consideration of that divorce of thine which is in my possession?" she says, "I have sold," and then the husband says, "I have purchased:" the woman shall become thrice divorced; because the divorce of the wife, which the husband has with him, is triple, and therefore all the divorces which the husband has with him shall be caused; just as if a man says to his wife (in Persian), "Hast thou purchased thyself in consideration of that which thou hast placed with me in trust (*Wudeeat*)," all trust property, which she had with the husband, shall be included.

2704. (1804.) A man says (in Persian) to a woman (who is another's wife), "Hast thou separated (thyself) from this thy husband, in consideration of whatever dower thou hast against him and of all maintenance during the period of *Iddut* that shall be due to thee from him by reason of divorce," and she says, "I have separated;" the husband is then asked, "Hast thou drawn thyself away," and he says, "I have drawn myself away:" the *Khoola* shall become complete between them, because they have described in detail what is *Khoola* in Persian.

2705. (1805.) A man divorces his wife reversibly; he then intends to make *Khoola* with her; then people say to the woman, "Hast thou drawn thyself away from this man with one divorce, in consideration of dower and the maintenance during the period of *Iddut*;" she says, "I have drawn myself away," the people then say to the husband, "Hast thou given one divorce," and he says, "I have given:" some of the learned lawyers have said that one reversible divorce takes place; whilst others have said that one irreversible (*bain*, that, is complete) divorce shall be caused, and this view is correct; because what the husband has said was by way of answer

to what the woman said (and when divorce is in consideration of property, it is *bain*).

2706. (1806.) A tribe (a number of people) say (in Persian), to a woman, with whom her husband has had intercourse "Hast thou purchased thyself with one divorce in consideration of every right which women have against men," she says, "I have purchased;" the husband then says, "I have given one divorce according to the *Soonnut:*" one reversible divorce shall take place; because an irreversible divorce is not according to the *Soonnut*, and, therefore, the husband's expression shall be deemed to have been used by way of a beginning (and not in answer to what the woman said, which required a divorce in consideration of property): this answer is according to the tradition (from Aboo Haneefa), stated in the Asul (of Mahomed); but according to the tradition mentioned in the Zyadut (a work of Mahomed), an irreversible (or *bain*) divorce is according to the *Soonnut;* and, therefore, it is proper that the husband's expression (also in the case given in this paragraph) should not be considered in the light of a beginning made by him (but should be considered by way of an answer).

2707. (1807.) A man says to his wife (in Persian), "Hast thou, for every right which women have against men, purchased thyself from me;" she says, "I have purchased;" then the husband says, "Go away now:" the divorce shall not be caused; because such an expression (as the last one) is sometimes used to denote refusal (instead of denoting compliance) and, therefore, that expression shall not be deemed to create (or cause divorce) on account of doubt.

2708. (1808.) A man says to his wife (in Persian), "Has thou purchased thyself from me;" she says, "I have purchased;" the husband then says, "I have sold:" one irreversible (or *bain*) divorce shall take place: but will the husband be released from the dower? Some of the learned lawyers have said that if the dower is due from the husband, then he shall get released; but if nothing is due from the husband, then the woman shall not have to pay anything to the husband. Whilst others have said that the husband shall not be released from the dower which is due from him: and verily have we stated this principle (see paragraph 1794) in a case where the husband and wife made *Khoola* with the words of sale and purchase in the Arabic language; so also when the *Khoola* takes place by the use of the words of sale and purchase in the Persian language.

2709. (1809.) A man says to his wife, "I have made *Khoola* with thee" intending thereby divorce: one divorce shall be caused thereby, and the husband shall not be released from the dower; because his expression, "I have made *Khoola* with thee" is one of the indirect expressions (of divorce) and by the use of indirect expressions other than the word *Khoola*, one irreversible (or *bain*) divorce is caused and the husband is not released from the dower; so also in this place (that is, here also one irreversible divorce takes place, and the husband shall not be released from the dower. Compare paragraph 1764, where *Khoola*, was intended, and it was, therefore, necessary for the wife to accept it and not a mere divorce was intended, and, therefore, the husband was released from the dower. See also 1727).

2710. (1810.) And if a man says to his wife (in Persian), "Purchase thyself from me," she says, "I have purchased;" but the husband does not say (afterwards), "I have sold:" no divorce shall be caused; so also if he says in Arabic, "Purchase thyself from me." And if he says to her, "Take *Khoola*" and she says, "I have taken *Khoola*," one divorce shall be caused on her according to most of the Mashaikhs, on whom be peace. And the difference is this that the husband's expression, "Take *Khoola*" is an imperative order (by the husband to the wife) to cause the divorce on herself by using the word *Khoola*; and when the husband does not mention the consideration, he, in effect, says to her, "Divorce thyself irreversibly (or make thyself *bain*);" and if he says, "Divorce thyself irreversibly (or make thyself *bain*)," and she says, "I have caused irreversible divorce on myself (or I have made myself *bain*)," one divorce shall be caused.

But the husband's expression, "Purchase thy person from me" and his expression in the Persian language, "Purchase thyself from me" is an imperative order on her to pay consideration; and, therefore, when the husband does not mention the (specific) consideration, then the order to pay consideration is not valid (on account of the consideration not being specifically mentioned) and there remains (only) the expression of the woman ("I have purchased,") and therefore the divorce shall not be caused (because there is proposal by the woman and no acceptance thereof by the husband). But if the husband has specified the consideration, saying to the wife (in Persian), "Purchase thyself in consideration of dower and maintenance during the period of the *Iddut*," or says to her in Arabic, "Purchase thyself

from me, in consideration of thy dower and the maintenance of thy *Iddut*," and the woman says in Arabic, "I have purchased," or says in Persian, "I have purchased," the *Khoola* shall become complete, (because the proposal by the husband, who specified the consideration in the proposal, is correct and valid).

2711. (1811.) A woman says to her husband in Persian, "I have purchased myself, in consideration of that (divorce) which you can (or has power to) give;" the husband then says, "I have given:" divorce shall be caused, and it is not necessary for the woman to have the intention to make the proposal when she says so. (Compare paragraph 1799). But if she says (in Persian), "I will purchase myself in consideration of that (divorce) which you can give me," and the husband says, "I have given," the *Khoola* shall not be correct, and the woman's intention shall have no effect (in this case even if she has the intention of *Khoola*). Because the woman's expression in Persian, "I have purchased myself," is proposal (with a view to the ultimate perfection of the contract of *Khoola*) and does not admit of being looked at merely as a promise (or declaration of intention to do something in future), and her expression (in Persian), "I will purchase myself," is a mere promise (or declaration of an intention to do something in future), and does not admit of being regarded as a proposal: and what is necessary to state in a proposal (in Persian) is, "I am purchasing myself," just as it is necessary in giving evidence to state, "I am giving evidence," and it is not sufficient for the witness to say, "I will give evidence."

But the woman's expression in Arabic, "I am purchasing myself," (is ambiguous and) admits of being regarded as a proposal and also as a promise, and the woman shall (therefore, in consequence of the ambiguity of the expression used in Arabic) make (form) an intention (agreeably to her wish in the matter).

2712. (1812.) And if the woman says to her husband (in Persian), "I have purchased myself from thee, in consideration of my dower and the maintenance during my *Iddut*, hast thou given," and the husband says, "Yes;" separation shall take place between them (and a *bain* divorce shall be caused); because her expression, "I have purchased myself," is a proposal just as if she had said, "I have purchased" and the husband's expression, "Yes," is in answer to that proposal, just as if he had said, "I have given." But if the husband says, "Yes, I will see," then no divorce shall be caused, because this does not amount to an acceptance.

2713. (1813.) A man makes *Khoola* with his wife, and she then says (in Persian), "Give another," and the husband says, "I have given:" another divorce shall take place, because her expression, "Give another," is a demand for divorce, and the husband's expression, "I have given," admits of being (used as) an answer: and some of the learned lawyers have said, that in such a case three divorces shall be caused, just as if she had said, "Cause (or give) the remaining divorces;" but the correct view is that set forth first.

2714. (1814.) A man sells to his wife one divorce, in consideration of her dower and the maintenance during her *Iddut*, and the woman "purchases it;" the husband then says immediately, "all three, all three:" the learned lawyers have said that it is feared that three divorces shall be caused; because the husband's expression, "all three," is referable to divorce, just as if he had said, "I have caused three."

2715. (1815.) A man makes *Khoola* with his wife, with one divorce (*i.e.*, by giving one divorce); and then his friends tell him, "Why hast thou done so;" he says in Persian, "Go, the woman shall be with three:" no other divorce shall be caused by this expression. And this point has *already* been discussed in connection with the question when the husband says, "Be it that I have given the divorce," (or "Be thou one to whom divorce has been given." See paragraph 965).

2716. (1816.) A man makes *Khoola* with his wife; people ask him, "How many did you intend," and he says, "As many as she wishes;" then if the husband had no (particular) intention (at the time of making the *Khoola*) the woman shall be once divorced (by virtue of the *Khoola*) because the husband did not (by the last expression) cause any divorce, he only entrusted to her (*Tufwees*) her wish (as regards the number of divorces) and therefore by such an expression, no other divorce shall take place (because the expression is not a formula of divorce, and the woman has received no authority to divorce herself, neither has she divorced herself).

2717. (1817.) A woman says to her husband (in Arabic), "Give me *Khoola*," adding in Persian, "I want three;" the husband says (in Persian), "Be it three" and he then makes *Khoola* with her with one divorce; (*i.e.*, he says, "I have made *Khoola* with thee," or "I have made *Khoola* with thee with one divorce:") one divorce shall be caused; because the husband's first expression (before he made the *Khoola* and before he used the words of

Khoola), "Be it three," is not the creation of divorce (*Eekaa*, *i.e.*, it is not a formula by which divorce is caused or created; but if he had said, "I have given three," then three divorces would have been caused).

2718. (1818.) A woman says to her husband, "I have purchased myself from thee, in consideration of dower and the maintenance during the *Iddut*," and the husband says, "I have made my hand short:" some of the learned lawyers have said, that no divorce shall be caused. And if the woman says, "I have purchased myself from thee, in consideration of all my rights;" (or if she expresses herself as in the previous case) and the husband says, "I have withheld my hand;" then it is reported from Sheikh-ool Imam Aboo Baker Mahomed, son of Fazal, on whom be peace, that his view is that the *Khoola* shall become complete, because people intend an answer by this and the like expression.

2719. (1819.) A woman says to her husband (in Persian), "I have made a gift to thee of my right, withhold thy claws from me;" he says, "I have withheld my claws from thee," and says so three times: some of the learned lawyers have said that it is feared that the woman shall become thrice divorced; and the lawyer Aboo Leith, on whom be peace, says, that one divorce shall be caused, because this expression is the explanation (in Persian) of the man's (Arabic) expression (*i.e.*, it is another form of the Arabic expression), "I have cleared thy path," (see paragraphs 1110 and 1131); and the divorce caused by the last mentioned expression is an irreversible (or *bain*) divorce (if there is intention); and a woman who has become *bain* (by means of the first expression), is not susceptible of another *bain* divorce (by the repetition of the first expression).

2720. (1820.) A woman says to her husband, "I have sold my divorce" or "I have made gift (of my divorce to thee") or says, "I have made thee owner (of my divorce;") and the husband says, "I have accepted," intending by those words a divorce; no divorce shall be caused; because the woman is not the owner of the divorce, and, therefore, she has no power to sell the same or make a gift of it.

2721. (1821.) A man says to his son-in-law, "Hast thou sold to me one divorce of my daughter, in consideration of that dower which she has owing from thee;" the husband says, "I have sold" and the father does not say after that, "I have accepted:" no divorce shall be caused.

2722. (1822.) A woman says to her husband, "I have made a gift of the dower to thee, remove thy claws from me:" the learned lawyers have said that if the husband divorces her (after this), then the woman's right to dower ceases; but if he does not divorce her, then her right to dower shall not cease.

2723. (1823.) A man says to his wife, "I have sold to thee one divorce, in consideration of thy dower and the maintenance during thy *Iddut*, (such divorce being) like the one which (the angel) Gabriel, on whom be mercy, brought to the prophet, on whom be God's pleasure and mercy;" the woman says, "I have accepted:" the learned lawyers have said that if the woman was at that time pure (that is, free from her menses) and if the husband has not had sexual intercourse with her in this period of purity, she shall become divorced (because *Soonnee talak* possesses such qualities).

2724. (1824.) A woman releases her husband of whatever right she has against him, on condition of his divorcing her; the husband then divorces her: the release given by her shall be valid; but if the husband does not divorce her, then the release shall not be valid. And if the woman releases him of whatever right she may have against him, on condition that he shall not marry any other woman upon her, then the release shall be valid, but the condition shall be void.

Hakim Abool Fuzul, on whom be peace, says, that where a thing is such that consideration is allowed in reference to it, there release regarding it is permissible when the release is made to depend on that thing which is expressed in the form of a condition, provided the condition is fulfilled: and where a thing is such that consideration is not allowed in reference to it, there release regarding it is permissible and the condition is void. (See Rud-ool-Moohtar, Volume II, page 932).

2725. (1825.) A man says to his wife (in Persian), "I have given divorce to thee; hast thou purchased thy person?" the woman says, "I have purchased my person three times, I have become released from being thy wife;" the husband says, "Thou hast been released:" if the husband means by his expression, "Thou hast been released," permission of what the woman has said, then three divorces shall be caused; but if he does not intend by this permission, then only one reversible divorce shall be caused.

God knows best.

CHAPTER IV.

ON ZIHAR.

[NOTE:—*Zihar* is derived from *Zuhur*, which in Arabic means *back*. *Zihar* means to oppose back to back: when there is discord between husband and wife, they, instead of remaining face to face towards each other, turn their backs one against the other. See Chulupy on Shareh Vikaya, Vol. II, page 83].

2726. (1826.) *Zihar* is to assimilate (or compare) one's wife to a woman, who is permanently unlawful to him, such unlawfulness arising from *Nusub* (*i.e.*, consanguinity) or *Reza* (*i.e.*, fosterage) or *Suhreeut* (*i.e.*, affinity or carnal connection whether legal or not).

2727. (1827.) And the consequence (or effect) of *Zihar* is the unlawfulness (or prohibition) of sexual intercourse and of those things which are preliminaries to such intercourse, and which raise desire for it (*Duwai*), such unlawfulness lasting up to the termination of the period of expiation (or *Kuffara*).

2728. (1828.) A man says to his wife, "Thou art to me like the back of my mother," and does not intend anything, or intends thereby divorce, or the rendering of the wife unlawful to him, or intends to make *Zihar*: this expression shall amount to *Zihar*.

And Aboo Yusoof and Mahomed, on whom be peace, say, that if the husband thereby intends to render the wife unlawful to him as upon a (*bain*) divorce, then the expression shall amount to (*bain*) divorce. If the husband says, "I intend thereby a falsehood," then, so far as the Kazee is concerned, the woman shall not be competent to confirm him, and shall not give him an opportunity to have sexual intercourse with her, but she is competent morally as between her and her God, to confirm him and give him such opportunity.

And there are rules which relate to *Zihar*, one of which is what is just stated.

2729. (1829.) *Secondly.*—When the husband says to his wife, "Thou art like my mother," without saying, "to me," and intends nothing (in particular): then according to them (*i.e.*, Aboo Haneefa, and Aboo Yusoof and Mahomed) nothing is obligatory on the husband (that is, the effect of this is *nil*, and the consequences of Divorce, or *Zihar* or *Eela* do not accrue).

2730. (1830.) And if the husband says, "Thou art *to me*, like my mother," or, "similar to my mother," and intends thereby excellence

(*birr*) and dignity (*Kuramut*; that is, the likeness to the mother is in these respects), nothing shall be obligatory on the husband; but if he intends *Zihar* thereby, then the expression shall amount to *Zihar*; but if he does not intend anything, then nothing is obligatory on him, according to Aboo Haneefa, on whom be peace; but Mahomed, on whom be peace, says, that the same shall amount to *Zihar* (because the formula is that of *Zihar*, except that the likeness is not confined to a member of the body); and according to one tradition from Aboo Yusoof, on whom be peace, nothing shall be obligatory on the husband, just as Aboo Haneefa, on whom be peace says, but according to another tradition (from Aboo Yusoof) the expression shall amount to an oath (that is, it shall amount to *Eela*), so that if the husband abstains from her for four months and does not approach her, she shall become completely separate (*bain*) with one divorce. But if the husband intends a divorce or a *Zihar*, then the expression used by him shall have effect according to his intention, *but if he does not intend anything, then nothing is obligatory on him according to the view of Aboo Haneefa, on whom be peace; but Mahomed, on whom be peace, says, and that is a tradition from Aboo Yusoof, on whom be peace, that this shall amount to a *Zihar*; and according to another tradition from Aboo Yusoof, on whom be peace, the same shall amount to *Eela*.*

And if the husband intends thereby to make the wife unlawful to him, the traditions (from Aboo Haneefa) in this matter have differed; but the correct view is that, according to all (that is according to Aboo Haneefa, Aboo Yusoof and Mahomed) the same shall amount to *Zihar*.

2731. (1831.) And the *third* case is when the husband says, "Thou art unlawful like my mother," intending thereby divorce, or *Zihar*, or *Eela*: the effect shall be according to the man's intention; but if he does not intend anything, then the same shall amount to *Zihar*, according to the view of Mahomed, on whom be peace, and this view is contained in one of the traditions from Aboo Haneefa, on whom be peace, (because the word *unlawful* is to be found here which was wanting in the previous case); and as held by Aboo Yusoof, on whom be peace, according to the tradition of Aboo Haneefa, on whom be peace, the same shall amount to *Eela*; but Khussaf, on whom be peace, says, that the correct view taken by Aboo Haneefa, on whom be peace, in this matter is that which Mahomed, on whom be peace, says.

* The passages between the asterisks seem to be a repetition.

2732. (1832.) The *fourth* case is when the husband says to his wife, "Thou art to me unlawful like the back of my mother:" this amounts to *Zihar* (whatever might be the intention. In paragraph 1828, the word "unlawful" is to be read by implication, and, therefore, the effect in the present case and in that to be found in paragraph 1828 is the same. See Chulupy on Shareh Vikaya, Vol. II, page 83). And Aboo Yusoof and Mahomed, on whom be peace, say, that if the husband intends divorce or *Eela*, then the effect of the expression shall be according to the intention, except that, according to Mahomed, on whom be peace, if the husband intends divorce, then the expression shall amount to divorce and nothing else, but according to Aboo Yusoof, it shall amount to divorce and *Zihar* (because the form of expression is that of *Zihar* and the divorce is caused by the intention); just as if the husband divorces his wife and then makes *Zihar*, or makes *Zihar* and then divorces, in which case the act shall amount to both divorce and *Zihar*.

2733. (1833.) And if a man says to his wife, "Thou art to me, like a corpse, or blood, or the flesh of a hog," the traditions have differed in regard to this matter; but the correct view is that when the husband does not intend anything, the expression shall amount to *Eela*, and if he intends divorce, it shall amount to divorce; but if he intends *Zihar*, it shall not amount to *Zihar* (because the expression is neither a formula of *Zihar* nor an indirect expression of *Zihar*, because the comparison is not with a *Maharim* or prohibited woman. See paragraph 1059).

2734. (1834,) And if the husband says to his wife, "Thou art to me like the thigh of my mother, or her belly or * * *," this shall amount to *Zihar*.

2735. (1835.) And the principle in the matter of *Zihar* is, that when the husband compares his wife to such of the member (or limb) of his mother's (or any other *Maharim's*) body as it is unlawful for him to look at, then the expression shall amount to *Zihar*; but if he compares her with such a member (of the body of his mother or of any other prohibited woman) as it is lawful for him to look at, as her hair, face, her head, her hand and foot, then the same shall not amount to *Zihar*.

2736. (1836.) And if the husband says to his wife, "Thou art to me like the knee of my mother, then according to analogy (*Kyas*), the husband shall be held to have made *Zihar*.

And if he says to her, "Thy thigh to me is like the thigh of my

mother," or "Thy head to me is like the head of my mother," this shall not amount to *Zihar*.

2737. (1837.) And if the husband says to his wife, "Thou, to me, art like the back of thy mother," this amounts to *Zihar*.

2738. (1838.) And if the husband says to his wife, "Thou art to me like the back of thy daughter (that is, by a different husband)," then if the husband has had intercourse with his wife, this expression shall amount to *Zihar* (because it is only by sexual intercourse with a woman, that her daughter becomes unlawful); not otherwise.

2739. (1839.) And if the husband has compared his wife with his father's wife or that of his son, this shall amount to *Zihar*, just as if he compares her with his mother. (See paragraph 1830.)

2740. (1840.) And if the husband compares his wife with a woman with whom his father has committed (*Zina* or) adultery, or with whom his son has committed adultery, then Mahomed, on whom be peace, says, that this shall not amount to *Zihar*; but Aboo Yusoof, on whom be peace, says, that this shall amount to *Zihar*; and this view is correct (because the woman, with whom comparison is made, is permanently unlawful and *Zina* can be a cause of *Hoormut-i-Moosahrut*).

And if he compares her with the mother of a woman or with the daughter of a woman, with which woman the man has committed adultery, this shall amount to *Zihar* (according to Aboo Yusoof and Aboo Haneefa).

2741. (1841.) And if a man kisses a strange (or unknown) woman with desire, or * * * * * * and he then compares his wife with the mother of that woman or with her (that is, that woman's) daughter, this shall not amount to *Zihar*, according to Aboo Haneefa, on whom be peace, who says that this act (that is, the kiss and look) does not amount to sexual intercourse. (See paragraphs 286 and 288.)

[Note to paragraphs 1840 and 1841. On reading Fath-ool Kadeer, Vol. II, pages 22 and 295; Tafseer-Ahmedy, page 196; Rudd-ool Moohtar, Vol. II, page 946; Buhr-ool Raik, Vol. IV, page 103; and Tawzeeh page 271 and page 272; the following considerations bear on the question:—I, *Hoormut-i-Moosahrut* is unlawfulness, arising from carnal intercourse whether that intercourse is lawful, that is, *Hulal* or not; see Vol. II, of these Lectures, page 100, paragraph 1177, and 277 within brackets, and

paragraph 1180, and 280 within brackets. If there is a legal marriage, then the marriage itself is constructive intercourse: if there is no legal marriage, then there must be actual sexual intercourse for such unlawfulness and prohibition to arise. By *Moosahrut*, the man becomes unlawful to the woman's branches, *i.e.*, daughters how low so ever, and to the woman's roots or mothers how high so ever: so also the man's branches or sons how low so ever, and his roots or fathers how high so ever, become unlawful to the woman. *Moosahrut* signifies *Hoormut* of these four classes, and does not extend further. This is generally the rule, although there are other rules in the matter, such for instance, as that by mere marriage with a woman without actual intercourse, her mother becomes unlawful, but marriage followed by actual intercourse is necessary to render her daughter unlawful. II.—*Hoormut-i-Moosahrut* is also established by what are preliminaries to carnal intercourse or *Duwai-i-Wuty*; as to this—see Volume II. of these Lectures, page 105, paragraph 1186 and 286 within brackets. III.—That *Hoormut-i-Moosahrut* should be established as the result of *Zina* or unlawful intercourse is a proposition in regard to which there is a difference of opinion amongst the *Hanifites* and *Shafeiites*, the latter maintaining that *Zina*, which is sinful, cannot lead to a proposition, which is to have a legal existence, such as a rule regarding prohibition or unlawfulness of marriage. The *Hanifites*, on the other hand, maintain that *Zina* does lead to a legal rule, and they base themselves on a text of the Koran—see Volume I. of these Lectures, page 18, Text No. 118 and 114 within brackets,—which text has not been very properly rendered by Rev. Wherry, and which will be explained in a future Volume—which forbids intercourse with a woman with whom the man's father has had intercourse, in other words, it lays down the rule of prohibition with the *Mootooa-i-Abb*, or the woman with whom the father has had sexual intercourse: the reason for the unlawfulness is sexual intercourse, because the word *Nikah* used in that text of the Koran must not lose its primary meaning, such primary meaning being sexual intercourse. IV.—The *Illut* or reason of a Text may be used for the purpose of laying down rules in other analogous cases; as for instance, * * * * is not dealt with in the Koran, but the Koran contains a Text—see Volume I. of these Lectures, page 8, Text No. 50 and 46 within brackets —which lays down that the *Illut* or reason for enjoining abstinence with women in their courses is pollution, and this reason or *Illut* can be used by *Kyas* or analogy to lay down a rule against * * * * in which

the same reason exists. V.—To reason by analogy with reference to an *Illut* or cause established for some other rule is called *Kyas* or analogy, and the case in which the rule is laid down by *Kyas* is called a *Musula-i-Kyasee*. The person who should make the *Kyas* is the *Moojtahid*, and when the *Moojtahids* or learned Doctors and Divines who make the *Ijtihad* and lay down the rule from *Kyas*, differ from each other, then the case is called a *Musula-i-Moojtuhid-fee*. VI.—The case of *Hoormut-i-Moosahrut* arising from carnal intercourse without marriage is therefore one of *Moojtuhid-fee* class, on account of the difference between the *Hanifites* and *Shafeiites* mentioned above: and the case of *Hoormut-i-Moosahrut* arising not from carnal intercourse, but from preliminaries is also *Moojtuhid-fee*; there is this difference between the two, that whereas in the former the rule is deduced with reference to reason or *Illut* to be found in a *Nuss* or Text of the Koran, in the latter the rule is not based upon such a comparatively sure basis; but is based upon a reason borrowed from the former case by analogy: if intercourse should lead to *Hoormut-i-Moosahrut*, then the preliminaries which lead to intercourse and are the cause of intercourse must also lead to *Hoormut-i-Moosahrut*. The *Towzeeh* lays down that a person cannot use the essence of his own limb for his own *Istimta* or benefit; therefore the child who has portions of the parents in him is unlawful: intercourse is the cause of the child; and when it is stated that intercourse establishes unlawfulness, the meaning is, that it establishes unlawfulness because it is the cause of the child: that intercourse is the cause of *Hoormut-i-Moosahrut* is laid down in the *Nuss-i-Koran*: but that the preliminaries are also the cause is not so laid down, but is inferred by *Kyas* drawn from intercourse. VII.—In a *Moojtuhid-fee* case the rule which is binding on the conscience of the Kazee is the rule which will govern the parties, although they might be the followers of a different sect. As to this—see Volume II. of these Lectures, page 295, paragraph 1642 and 742 within brackets, and Volume III., paragraphs 1614, 1769, 1773 within brackets; see also Arabic Hedaya, Volume III., page 322. But there is this difference that if the Kazee is of the *Shafei* sect, his decree shall not be binding on the *Hanifite* parties in the case of *Hoormut-i-Moosahrut* arising from *Zina*, in which the rule of the *Hanifites* is based on an *Illut* to be found in a text of the Koran, although it shall be binding on them in the case of *Hoormut-i-Moosahrut* arising from preliminaries in which the rule of the *Hanifites* is not based on an *Illut* to be found in a text of the Koran. VIII.—In the case in paragraph 1840, Mahomed says,

that the same does not amount to *Zihar*, because it is a rule for the validity of *Zihar* that the comparison should be made with the limb of a woman who is perpetually unlawful, but that in the case in 1840, the *Shafei* Kazee might declare absence of *Hoormut-i-Moosahrut* and declare in favor of the lawfulness of the woman with whose limb the comparison has been made; and that, therefore, on the supposition of such a declaration by the *Shafei* Kazee here the comparison would not be found with the limb of a woman who is perpetually unlawful, and, therefore, that there is no *Zihar*. But at the same time Mahomed does hold that, according to Aboo Haneefa, with whose views he concurs, there is perpetual prohibition with the woman with whose limb the husband has compared his wife. But Aboo Yusoof says that there shall be *Zihar*, because this is not a case in which the effect of a decree of the Kazee of the *Shafei* sect is to render the decree binding: because the *Illut* or reason is to be found in the *Nuss-i-Koran*. IX.—In the case in paragraph 1841, there is no *Zihar*, because the case is that of *Hoormut-i-Moosahrut* arising from preliminaries and not from *Zina*, and this is a case in which the decree of a Kazee of the *Shafei* sect is capable of being given effect to, the reason or *Illut* not being stated in the *Nuss-i-Koran*; so that the perpetual unlawfulness of the woman with whom the comparison has been made can be done away with: and *Zihar* requires such a perpetual prohibition in the woman with whom the wife has been compared that the unlawfulness cannot be done away with].

2742. (1842.) And if the husband compares his wife with the back of a woman who is, to a certain extent, not lawful to him, as for instance, a woman who is a (*Mujooses* or) fire-worshipper, and a woman who has become an apostate from Islam (or *Moortudda*) and the wife of another man, this shall not amount to *Zihar*, (because these women are not perpetually prohibited).

2743. (1843.) So also comparison by the husband of his wife with a man, whoever he might be (does not amount to *Zihar*).

2744. (1844.) And if the husband says to his wife, "Thou art, to me, like the back of my mother, if it pleaseth God," this shall not amount to *Zihar*, just as divorce is not effective owing to the addition of such words.

2745. (1845.) And if he says to his wife, "Thou art to me like the back of my mother, if so and so wishes;" or says, "thou art to me like the back of my mother, if it pleaseth thee," these shall be referable

to the desire at the same meeting (that is, for the *Zihar* to be effective, the desire must be expressed at the same meeting).

2746. (1846.) And if a man makes *Zihar* with his female slave, or with his *Oomm-i-wulud*, then this *Zihar* is void, and it shall not be unlawful for him to have sexual intercourse with her (because *Zihar* is confined to wife according to the Koran. See pages 60 and 61, Volume I. of these Tagore Lectures, Texts 436–39).

2747. (1847.) And if a woman makes *Zihar* with her husband, this shall be void, and she shall not be obliged to expiate for it, just as if the wife should refer the divorce to her husband (saying, "Thou art divorced"). But Aboo Yusoof, on whom be peace, says, that the woman shall have to expiate (in the case of her making the *Zihar*).

2748. (1848.) If a man repeats *Zihar* with a woman, then each *Zihar* shall involve the obligation to expiation (that is to say, if the man repents of his rashness and wants to take back his wife, he must make *Kuffara* for his rashness for each act of *Zihar*; see Volume I., Futawai Alumgeeri, page 692; except when the intention by the repetition is to re-affirm and repeat the first and then only one *Kuffara* is obligatory).

2749. (1849.) So also if a man makes *Zihar* with four wives, it is obligatory on him, in respect of each wife, to observe expiation (or make *Kuffara*).

2750. (1850.) And the *Zihar* made by one who is dumb, in writing and by known signs, is binding (or *lazim*).

2751. (1851.) And if the husband makes *Zihar* for a time fixed, saying, "Thou art to me, like the back of my mother, this day, or this month, or this year," then the husband shall be considered to have made *Zihar* at that very instant and when that period (that is, the day, or the month, or the year) expires, the *Zihar* shall become void. (See Futawai Alumgeeri, Volume I., page 691, for further details in this matter).

2752. (1852.) And if a man says to a strange woman, "When I shall marry thee, then thou art to me like the back of my mother," and he then marries her, he shall be considered to make *Zihar* (at the time of the marriage).

2753. (1853.) And if a man says to a strange woman, "When I shall marry thee, then thou art divorced" and then says, "When I shall marry thee, then thou art to me like the back of my mother," and he then marries her, both divorce and *Zihar* shall be binding on the husband,

because both of them could take place (or be caused) at one and the same time (and therefore both could be made dependent on the same condition).

So also if he says, "When I shall marry thee, then thou art to me like the back of my mother, and thou art divorced" (where two events are made dependent on one condition and *Zihar* is mentioned first) and then marries her, both of them shall be binding on the man.

And if he says, "When I shall marry thee, then thou art divorced, and thou art to me, like the back of my mother," and then marries her, the divorce shall be caused, but the *Zihar* shall not be binding on him, according to Aboo Haneefa, on whom be peace (because when the condition takes precedence, and there are two effects which are coupled by "and," then in the event of the condition being realised, the effects shall spring up in their order) but his two disciples have said, both the divorce and the *Zihar* shall be binding on the man (because both the effects spring up at once, on the condition being realised).

And this is based on the principle that the order in the expression of dependent sequences necessitates the occurrence of those dependent sequences in the same order in which they are expressed, according to Aboo Haneefa, on whom be peace; but his two disciples have said that such order does not necessitate order in the occurrence of the sequences: therefore when, according to Aboo Haneefa, on whom be peace, the divorce occurred first (by which the woman became completely separated) and when a woman who has become completely separated is not a fit subject of *Zihar*, then the *Zihar* shall not be binding on the man; but when the *Zihar* occurs first, then the fact of a *Zihar* having taken place first not having the effect of disabling the woman from becoming a subject on whom divorce could be pronounced, a divorce could also occur.

2754. (1854.) When a man makes *Zihar* with his wife and then divorces her thrice, and then marries her, after the woman has married another husband, then the *Zihar* shall continue to subsist (in spite of the three divorces and the fresh marriage; because *Zihar* does not put an end to the relationship of husband and wife, and is not a divorce, and is not removable except by *Kuffara*) and it shall not be lawful in him to have sexual intercourse with her before observing expiation; because the fact of a separation having taken place (as was done here on account of the three divorces) does not render the *Zihar* void.

2755. (1855.) So also (the *Zihar* shall not become void) if the woman becomes an apostate—may God save us from such a calamity—(and

apostacy makes the *Nikah Fuskh*) and then the woman becomes a moslem and the husband marries her.

And if both of them become apostate at once—may God save us from such a calamity—(and the *Nikah* in this case continues to subsist) and then both of them become moslem, then both are in *statu quo* as regards the *Zihar* according to Aboo Haneefa, on whom be peace (that is, if the husband makes *Zihar* with his wife whilst both are Moslem, then the fact that they subsequently become apostate, does not render the *Zihar* nugatory).

2756. (1856.) So also if a man makes *Zihar* with his wife, she being the female slave (of somebody else) and the husband subsequently purchases her (by which the marriage becomes void), it is not lawful in the husband to have sexual intercourse with her, before the expiation of the *Zihar*.

So also if the husband emancipates his wife (he having married the slave of another and then purchases her, and then gives her her freedom) and then marries her (then the *Zihar* previously made is not rendered nugatory).

2757. (1857.) And if the husband says to his wife, "If thou shalt enter the house, then thou art to me like the back of my mother," and then he divorces her so that she becomes completely separated from him (that is to say, the husband gives her an irreversible divorce) and then the woman (even) during her *Iddut*, enters the house, the *Zihar* shall not be binding on him, because if the husband were to give *Zihar* for the first time (in the form of a *Tanjeez* or directly letting fall or giving the *Zihar* instead of *Talik* or making the *Zihar* conditional) in such a state (*i.e.*, after an irreversible or *bain* divorce), the *Zihar* would not be valid, so also (the *Zihar* shall not be valid) if, having been made dependent on a condition, it is made operative on account of the realisation of the condition.

2758. (1858.) And the expiation or *Kaffara* of *Zihar* is mentioned in the Book of God (that is, the Koran, see text of the Koran, Nos. 436, 437, 438 and 439, pages 60 and 61 of Volume I. Tagore Lectures and page 292, Volume II. of the Fath-ool Kadeer).

2759. (1859.) And if the man who makes *Zihar*, does not observe expiation, and the matter is submitted to the Kazee, the latter shall imprison the man until the man expiates (and makes the *Kaffara*) or divorces his wife.

God knows best.

CHAPTER V.

SECTION I.

ON EELA.

2760. (1860.) *Eela* (which according to Dictionary means a vow or *Yumeen* — see Inaya, Volume II., page 211), is to abstain from having sexual intercourse with one's wife, such abstinence having been strengthened by a vow (or oath) on God, or by a vow in reference to something else, such as divorce, emancipation, fast or pilgrimage, and such like things; such abstinence being self-imposed by the vow in an absolute way (*i.e.*, the abstinence being without reference to time) or confined to four months in the case of free women and two months in the case of female slaves, such abstinence being of a nature so that there is no interruption of (the continuity of) time (of abstinence), and it is not possible (to imagine a point of time in which) there could be sexual intercourse with her without the husband being guilty of a breach of the oath (or, in other words, the formula must not contain an interruption of time as in the instance given below); and when such time intervenes, then the man cannot be held to have made *Eela*; and the way in which such intervention could be caused (and in which there is no valid *Eela*) is when the husband says to his wife, who is a free woman, "By God, I will not have sexual intercourse with thee for four months, but one day," or says, "for one year, but one day;" in these cases, the man shall not be considered to have made the *Eela* until the excepted day is found (that is to say, if the man has made the *Eela* with reference to the period of four months, then this form of asseveration, shall not amount to *Eela*, because, taking out the excepted day, there remains less than four months; and there shall be no *Eela*, for which a period of four months is necessary; but if the *Eela* is made with reference to one year excepting one day, then the *Eela* is not formed and will not commence until the man has had intercourse, because it is possible that he might have intercourse every day, and if after the oath, the man has connection with his wife on a day so that four months or more still remain to expire, then the *Eela* shall commence; and if four months are allowed to expire without intercourse, then the *Eela* shall become complete, and one divorce shall be caused; but if the man does not allow the four months to be completed, and has sexual intercourse within that period, then he commits a breach of his oath, and if the oath relates to God, he shall have to make *Kaffara*, and if the oath relates to some other condition such as the

emancipation of a slave, then the slave must be emancipated, and the particular effect of the condition shall follow).

So also if the husband says, "By God, I will not have sexual intercourse with thee, until so and so arrives (from the journey)" he shall not be held to have made the *Eela* (in the same way as there is no *Eela* when one day is excepted), because it is possible for the traveller to return within the period (of four months, which is the period during which abstinence must be secured for certain; here the traveller might come the next day or might not come for a year).

2761. (1861.) So also if the husband says (to his wife), "By God, I will not have sexual intercourse with thee, until thou or so and so dies," the man shall not be held to have made *Eela*, on account of the possibility of so and so dying within the period (of four months which is the period of *Eela*: be it noted that if the man says, "until thou die" this is good *Eela* because here the meaning of *Tabeed* or perpetuality is found, although she might die the next day; the expression means, "I will never have intercourse with thee.")

2762. (1862.) And if a man swears that he will not have sexual intercourse with her, "until the appearance of *Dujjal*" or "until the rising of the sun from the west," the man shall be held to have made the *Eela*, by *Ishtisan* (or weak analogy; *Kyas* or analogy requires that there should be no *Eela*, because it is possible for *Dujjal* to appear and for the sun to rise in the west in less than four months; but bearing in mind that these events, it is believed, will happen near the Doom's day, and that in consequence of such belief people use these expressions to denote a long distance of time, the *Eela* shall according to *Ishtisan* or weak analogy, take place on account of the expression being ordinarily used to denote a long distance of time).

2763. (1863.) And if a man says, "By God, I will not have sexual intercourse with thee, until I emancipate this my slave" or "until I divorce such and such a woman," the man shall be held to have made *Eela*, according to Aboo Haneefa and Mahomed, on whom be peace (because the expression means, "I will never have intercourse" because as a rule the wife is not divorced, and the slave not emancipated).

2764. (1864.) And if the husband says, "By God, I will not have sexual intercourse with thee, until thou die or until I die" or "until thou art killed" or "until I am killed" the man shall be held to have made

the *Eela* (because the expression denotes *Tabeed* or perpetuality, and the man in effect says, "I will never have intercourse)."

2765. (1865.) And the husband is not to be held to have made *Eela* except when he takes an oath against having sexual intercourse * * * * * : and if his oath refers to something besides * * * * * * * * then he shall not be held to have made *Eela*.

2766. (1866.) A man says to his wife, "By God, my skin shall not touch thy skin," he shall not be held to have made *Eela*; because (the result of the oath is that) the man shall commit a breach of his oath by mere touch, without intercourse * .

2767. (1867.) And if the man says, "* * * * * * * * * * ," he shall be held to have made *Eela*; because this expression is intended to mean sexual intercourse.

2768. (1868.) And if the man says, "If I sleep with thee, then thou art divorced" and does not intend anything, he shall be held to have made *Eela*; because people do intend to mean sexual intercourse by such an expression; and if he intends (merely) sleeping together, he shall not be held to have made *Eela*; and if he sleeps with her and does not have sexual intercourse with her, he shall commit a breach of his oath (on account of the breach of a simple vow without involving *Eela*).

2769. (1869.) And if he says, "If I extend my hand to my wife for one year, then to me such and such a thing," and he has no sexual intercourse with her for four months, the woman shall become completely separated (or *bain*) with one divorce; because such expression, according to usage, is intended to mean sexual intercourse; and for this reason if the man has intercourse with her, within the year, * * * * * * * * * the man shall not commit a breach of his oath.

(1870.) And if a man says to his wife, "If * * * * * * * * * or invite thee to my bed (*Firash*), then thou art divorced;" he shall not be held to have made *Eela*, because it is possible for him to have sexual intercourse with her without the divorce being caused (as the result of this *Eela*) in this way that he might invite her to the bed or *Firash*, by which act he will commit a breach of his oath and he might afterwards have sexual intercourse with her, without committing a breach of the oath by such intercourse (that is, the breach of the oath being constituted by one of two acts, it was constituted by the invitation to

the *Firash*, and this breach of oath resulted in the divorce being caused; the oath thus spent itself, and there was no result of the subsequent sexual intercourse; therefore there was no *Eela*; because when *Eela* is made by means of a conditional expression, then the condition should refer to sexual intercourse, and it should be such that the particular result or sequence, *e.g.*, divorce or emancipation, &c., should follow with certainty from the realisation of the condition: here the particular result is divorce, and that result was avoided in the way pointed out).

2771. (1871.) And if the man says to his wife, "If I bathe from (after) my impurity (an indirect expression for sexual intercourse) as long as thou continue to be my wife, then thou art divorced thrice," and he repeats this expression, and the woman is pregnant (at the time the husband uses this expression), and the husband has no sexual intercourse with her after so expressing himself, and she is delivered after four months or more (from the time the husband so expresses himself), then the woman shall verily become completely separated *(bain)* with one divorce, at the expiry of four months (from the time the husband so expressed himself); because the husband did make *Eela* (by what he said) and her *Iddut* shall expire with delivery, and if he marries her (again) after the expiry of the *Iddut*, he shall not continue in his *Eela* (notwithstanding his words "as long as thou continue to be my wife" and notwithstanding the repetition of words of *Eela*); and if he has sexual intercourse with his wife (after the second marriage), he shall not commit a breach of his oath (that is, the three divorces which were the result of the condition shall not be caused); because his oath was confined, as to its duration, to the subsistence of the particular marriage (in which the *Eela* was made). And after one divorce has taken place as the result of the *Eela*, no other divorce shall be caused on her, although the period sufficient to cause another *Eela* should expire before her delivery (and although the connection of husband and wife subsists to a certain extent and for certain purposes until delivery, and the *Iddut* of a pregnant woman, who has been divorced, extends till her delivery); because a woman, who has been completely separated (*bain*) by means of *Eela* shall not have another divorce caused on her as the consequence of one (and the same) *Eela*, although the woman might be in the *Iddut* (from the divorce as a result of the *Eela*) until he marries her (again in her *Iddut*, when the period of another *Eela*, as the result of one and the same oath, would begin; because in the oath the husband had said, "As long as thou continue to

be my wife;" and although he has married her afresh, still the second marriage was during the *Iddut* of the first marriage; and before the expiry of the *Iddut*, the connection of the first marriage subsisted for certain purposes although the divorce was *bain*, and, therefore, the first oath also subsisted). And in this case, although the husband repeated his expression, still the period embraced by each of the expressions is one and the same, and in one period only one divorce takes place (and, therefore, no other divorce shall be caused on her, although the period sufficient to cause another *Eela* expires before her delivery).

2772. (1872.) And if the husband says to his wife, "If I have sexual intercourse with thee for a year then thou art divorced thrice," and he then seeks for a device that the three divorces might not be caused on her; the device for the husband is, (to abstain from sexual intercourse for a year in this way) that he should leave her for four months, so that she should become completely separated (*bain*) with one divorce, and he should then (not marry her but) stop for eight months so as to complete the year (in which year, by reason of there being only one marriage, *viz.*, that which existed before the *Eela*, that *Eela* shall cause no fresh divorce, compare paragraph 1874); and should then marry her afresh; and if he (after such marriage) has sexual intercourse with her, the woman shall not become divorced, and, therefore, three divorces shall not be caused on her, because by the expiry of the year three divorces would not be caused on her by reason of absence of sexual intercourse, and after the expiry of the year, the oath would not continue to subsist.

2773. (1873.) And if the husband says to his wife, "If I ever have sexual intercourse with thee, then thou art divorced thrice," there is no device to get over this oath; because if he has sexual intercourse with her, she shall become thrice divorced (as the result of the conditional expression); and if he abstains from having sexual intercourse with her, one divorce shall be caused on her (as the result of the *Eela*) by the expiry of four months, and if he marries her afterwards, the *Eela* shall begin again (on account of his expression, "If I *ever* have sexual intercourse.")

2774. (1874.) A man says to his wife, "By God I will not have sexual intercourse with thee for one year," and four months expire, and the woman becomes completely separated (or *bain*) with one divorce; he then marries her again, and another period of four months expires from the time of the (second) marriage, another divorce shall be caused on

her, because the oath still subsists (the year not having expired); and if he marries her a third time and another period of four months expires, no other divorce shall be caused on her, because the oath was confined to one year, and after this (last) marriage four (full) months do not remain for the year (because the ceremony of the marriages must take some time, however small, and that time would, therefore, make the whole of the period exceed one year) and, therefore, no other divorce shall be caused on her.

2775. (1875.) A man says to his wife, "If I have sexual intercourse with thee, then this my slave shall be free;" and four months expire, and the woman sues him before the Kazee (claiming to have become divorced) and the Kazee effects separation between them, and then the slave establishes proof by witnesses that he has always been a free man: the Kazee shall make a decree that the (alleged) slave has always been a free man, and the *Eela* shall then become void, and the woman shall be returned to her husband, because it has became clear that his *Eela* was not valid.

2776. (1876.) A man says to his wife, "By God I will not have sexual intercourse with thee in this room:" he shall not be held to have made an *Eela* (because his oath does not absolutely prevent him from having sexual intercourse at all).

2777. (1877.) A man says to his wife (in Persian), "If thou shalt not come within me, then thou art divorced," intending thereby to prevent his own self from having sexual intercourse, he shall have made *Eela;* but if he does not intend thereby prevention of sexual intercourse, but only intends that he has no necessity for sexual intercourse with her, then he shall not have made an *Eela:* so also shall there be no *Eela* if he does not intend anything.

2778. (1878.) A man makes *Eela* with his wife and then says, "I have made this wife partner with thee in thy *Eela,*" pointing to his other wife: the man shall not be considered to have made *Eela* with the other wife. But if he makes another wife partner with her in *Zihar,* his act in making her partner shall be valid; because the first expression (*viz.,* where he made *Eela* with one wife) verily came to an end, and, therefore, he has no right to alter it; but in the case of *Zihar,* the effect of the first expression (that is, the expression by which he made *Zihar* with one wife) is not altered (by his making another to participate in the *Zihar*) but in the case of *Eela,* the effect of the first expression is altered, because if it

is correct to make another woman partner in the *Eela*, then the breach of oath shall appertain to sexual intercourse with both (jointly) and, therefore, it is not valid to make another woman participate in the *Eela*. (That is to say, if in making the *Eela* the husband says, "If I have intercourse with thee then my slave shall be free," then the emancipation depends on the intercourse with the particular wife; therefore the effect of the *Eela* is that emancipation shall take place by intercourse with her alone; but if he makes another wife partner in the *Eela*, then the *Eela* would mean that the emancipation would take place by intercourse with both and not by intercourse only with the first-mentioned wife; therefore the effect of the *Eela* would be altered by making another wife partner in the *Eela* with the first-mentioned wife. But in the case of *Zihar*, the effect is to make the wife, with whom *Zihar* is made, unlawful to the husband; and if another wife is made partner with the first-mentioned wife in her *Zihar*, then the effect is not altered, because the unlawfulness of the first-mentioned wife remains the same notwithstanding that another wife is made partner with her in the *Zihar*).

2779. (1879.) A man says to the two wives he has, "By God I will not have sexual intercourse with you both:" he shall be held to have made *Eela* with both; so that if four months expire, and the man has no sexual intercourse with them, one divorce shall be caused on each of them.

And if he says, "By God I will not have sexual intercourse with one of you two," he shall be held to have made *Eela* with one of them, so that if four months expire, one divorce shall be caused on one of them (and the husband must fix the identity).

2780. (1880.) A man makes *Eela* with his wife (without perpetuity of vow to abstain as in paragraph 1873) and then divorces her thrice, and then marries her again, after she had been married to a different husband (and divorced by that husband): he shall not be held to have made *Eela*.

And *Eela* is not like *Zihar*, because to make *Eela* is to make divorce dependent on absence of sexual intercourse, and, therefore, *Eela* must be confined to the exsisting ownership (or state of marriage), and by three divorces the ownership comes to an end: contrary to the case of *Zihar*, (if the *Zihar* is followed by three divorces, and the woman then marries another husband, and then the first husband marries her, the effect of the *Zihar* shall still continue) because *Zihar* is to make the wife unlawful to the

husband until the happening of a certain contingency (*i.e.*, the payment of expiation) and *Zihar* is not equivalent to divorce; and, according to Zoofar, on whom be peace, the *Eela* is not rendered void by three divorces.

2781. (1881.) A man makes *Eela* with his wife; he then divorces her (even) with one irreversible (*bain*) divorce; then if four months expire from the time of the *Eela*, whilst the woman is in her *Iddut* (from the *bain talák*), she shall become divorced a second time as a consequence of the *Eela*; but if her *Iddut* expires, and then the period of *Eela* (*viz.*, four months) expires, the divorce shall not be caused by virtue of the *Eela*.

Thus the *Iddut* of divorce and the period of *Eela*, are like two racing horses; whichever of the two arrives first has its effect enforced (that is, if the period of the *Eela* expires before the period of the *Iddut*, then the effect of the *Eela* shall be established, that is, one divorce shall be caused; but if the period of the *Iddut* expires before the period of the *Eela*, then the effect of the expiry of the *Iddut* shall be established, and that effect is that the divorce as a consequence of the *Eela* shall not be caused).

2782. (1882.) A man makes *Eela* with his wife (the *Eela* not being confined and restricted as to time) and he then divorces her, and then marries her again: if he marries her before the expiry of the *Iddut* (of the divorce) then the *Eela* shall remain as it is (because before the expiry of the *Iddut*, the relationship to a certain extent subsists) so that if four months expire from the time of the *Eela*, another divorce shall be caused, as a consequence of the *Eela*; and if he marries her after the expiry of the *Iddut* consequent on the divorce to her, he shall remain in his *Eela*, but the period of the *Eela* shall be regarded from the time of the (second) marriage.

2783. (1883.) A man makes *Eela* with his wife after giving her an irreversible divorce, he shall not be considered as having made the *Eela* (although he might have made the *Eela* within the period of the *Iddut*).

2784. (1884.) A man makes *Eela* with his wife and there intervenes between him and her, a journey of four months or more, or the man is sick, not having the ability to have sexual intercourse, then his (*Fye* or) retractation from the oath (see Volume II, page 78, Chulupy on Shureh Vikaya) shall be with his tongue (in order that he might avoid the divorce which would be the consequence of this enforced abstinence from intercourse) according to us (Aboo Haneefa, Aboo Yusoof and Mahomed) and he must say, "I have (*Fye*) retracted from the oath in her favor," so that if he

retracts from his oath by means of his speech, and then recovers from his sickness within four months (from the date of the *Eela*), this retractation from the oath by means of speech shall become void; and he cannot retract from his oath (and avoid the divorce consequent on the *Eela*) except by having sexual intercourse with her.

2785. (1885.) And if the person who has made the *Eela* is in imprisonment on account of another's right, then his (*Fye* or) retractation from oath by means of speech is not proper; but if he is in imprisonment out of oppression, without the right of another being involved, then his (*Fye* or) retractation from oath by means of speech shall be permissible, and he shall be considered as absent or sick.

2786. (1886.) And if the sick man makes (*Fye* or) retractation from oath by a mental act, and does not express it in words, this shall not be considered as a retractation.

2787. (1887.) When one who has made *Eela* has intercourse with his wife * * * * this shall not amount to a (*Fye* or) retractation from the oath.

God knows best.

Section II.

ON THE SEPARATION BETWEEN THE SPOUSES, BY REASON OF ONE BECOMING THE OWNER OF THE OTHER, AND BY REASON OF ONE BECOMING AN INFIDEL.

2788. (1888.) A man purchases his wife (she having been the slave girl of another person) or a fractional share of her: the marriage shall become void (*batil*); and if he divorces her before the expiry of the time sufficient for the expiry of the period of *Iddut*, the divorce shall not be operative; because divorce does not take place except in a case of marriage or in a case of *Iddut* arising from marriage (that is, divorce takes place only when, at the time of the divorce, the woman is the wife or when at such time she is observing her *Iddut*). And after the purchase (by her husband) the woman so purchased becomes lawful to her master (who was her husband before the purchase) by right of ownership of person (otherwise called ownership of the right hand) and (having become lawful by purchase) she has to observe no *Iddut* either on account of the right of the master (to whom she belonged before she was purchased by her husband) or on account of the right of the

Shera (because the *Shera* does not ordain that there should be *Iddut* when the cause of the right of enjoyment changes from ownership of *Nikah* to ownership of person. See paragraph 1094).

And if the husband emancipates her after purchasing her (the effect of such emancipation being that the woman, who is now free, becomes unlawful to the man) and the husband divorces her before the expiry of the time sufficient for the expiry of the period of *Iddut*, then the divorce shall operate upon her according to Mahomed, on whom be peace, (who has held that the *Iddut* which the woman shall have to observe is that of the *Nikah*, and not that of the emancipation), and according to the first view taken by Aboo Yusoof, on whom be peace; then Aboo Yusoof, on whom be peace, changed his opinion and held that the divorce shall not be operative; and this view is taken by Zoofar, on whom be peace; and he Fatwa is given accordingly.

2789. (1889.) A man says to his wife, who is the slave girl (of another), "Thou art divorced according to the Soonnut" and he then purchases her, and then the time for the occurrence of the Soonnut divorce arrives, the divorce shall not come into operation, (because, at the time when the *Talak* is to be caused, she ceases to be his wife, and becomes an *amut* or slave).

2790. (1890.) So also if the husband makes *Eela* with his wife, (who is the slave girl of another) and then purchases her, and then (after the purchase) the period of the *Eela* expires, (the divorce as a consequence of the *Eela* shall not be caused. See paragraph 1094).

2791. (1891.) So also if the husband makes the divorce (of such wife as aforesaid) dependent on some condition, and the condition comes to be realised after the husband becomes her owner (and after she has ceased to be his wife), the divorce shall not be caused.

2792. (1892.) And if the husband emancipates his wife (who is the slave girl of another, and with whom the husband has dealt as in paragraphs 1889, 1890, and 1891) after purchasing her, and then (before the expiry of the period of *Iddut*) the time of the Soonnut divorce arrives, or the period of the *Eela* expires, or the condition is fulfilled, the divorce shall be caused according to the view of Mahomed, on whom be peace but, according to analogy from the view of Aboo Yusoof, on whom be peace, the divorce shall not be caused; and the Fatwa is given accordingly. (See paragraph 1095).

2793. (1893.) A free woman purchases her husband (who is the slave of another) or a fraction of him, the marriage shall become void (and the woman shall not be lawful to the man; because, under the Mahomedan Law, the woman has the right of ownership, but such right of ownership does not lead to a right of enjoyment); and if she emancipates her husband, and the husband then divorces her whilst she is in the *Iddut*, (which here is obligatory on the woman; because the man is no longer lawful to her, contrary to paragraph 1888) the divorce shall not be operative on the woman, according to the second view taken in the matter by Aboo Yusoof, on whom be peace, (because the *Nikah* having been rendered void, the parties become total strangers, and the husband loses the power of divorce); but she shall become divorced according to the first view taken by him, and this view is also taken by Mahomed, on whom be peace, (because the general rule is, that divorce can be given during the *Iddut*, but this rule is not applicable in this case; because the foundation of the general rule is the principle that during the period of the *Iddut* the husband does not become an absolute stranger, but the relationship of husband and wife subsists to a certain extent: but in the present case, although there is the obligation of *Iddut* on the woman, still the parties have become absolute strangers, because the woman becomes totally and perpetually prohibited to the man, there being no *Nikah* between a woman and her emancipated slave, or between a *Syuda* and her *Ghoolam*. See Futh-ool Kadeer, Volume II, page 26. See also paragraph 1095).

2794. (1894.) And if the slave husband (*i.e.*, a husband, who is the slave of another), says to his wife, who is a free woman, "Thou art divorced according to the *Soonnut*," and the wife then comes to be the owner of her husband (whether she afterwards emancipates him or not), and then the time for the operation of the *Soonnut* divorce arrives, the divorce shall be operative on her; because a free woman is not lawful to her own slave, and therefore the obligation of the *Iddut* on the woman becomes apparent (because they can no longer enjoy each other) and therefore she becomes a fit subject for the divorce (pronounced by the man whilst he was her husband) contrary to the first case (in paragraph 1893, where the divorce did not, correctly speaking, take place, because the divorce was pronounced at a time when the husband had no authority to pronounce it. See also paragraph 1095).

2795. (1895.) The wife becomes an apostate—May God save us

from this calamity: it is reported from Aboo Nusur and Abool Kassim Suffar, on whom be peace, that the view taken by them is that no separation shall be caused between them, so that the woman may not attain her end, assuming the end she has in view (by becoming an apostate) is to get separated from her husband. But according to Zahir-i-Ruwayet, separation shall be caused, and the woman shall be imprisoned until she (again) becomes a Moslem, and the marriage shall then be renewed (with the same husband) in order to put a stop to her apostacy, (that is, the woman shall again be married to the same husband on her re-accepting Islam; because if allowed the choice of another husband, the result would be that a wide door would be opened to apostacy, and women, who are tired of their husbands, would have only to renounce their faith and re-accept Islam in order to get rid of their old husbands and still get all the benefits of Islam).

2796. (1896.) A man makes the divorce of his wife dependent on entry in the house, and he then becomes an apostate—God save us from such a calamity—and joins (*Lehak*) the Dar-ool Hurub; the woman then enters the house: the divorce shall not be caused on her according to Aboo Haneefa, on whom be peace, (because the effect of the husband's *Lehak* or joining the Dar-ool Hurub is similar to death, and after the death of the husband, the conditional divorce is not caused, when the condition is realised after his death, because a conditional divorce is viewed in the light that on the condition being realised, the husband says, "thou art divorced;" but if the husband is dead, there is nobody to say, "Thou art divorced," when the condition is realised).

2797. (1897.) So also if the husband makes *Eela* with his wife, and then joins the Dar-ool Hurub, and then the period of the *Eela* expires, the divorce shall not be caused (because the *Nikah* comes to an end, and becomes cancelled and void at the period of the *Eela*, and there is no wife on whom divorce could be caused).

2798. (1898.) And if the husband divorces his wife after he has joined the Dar-ool Hurub, the divorce shall not be caused (because by his becoming an apostate, the marriage has become dissolved); and if he again returns to the Dar-ool Islam as a Moslem, whilst the woman is in her *Iddut* (on account of the apostacy of the man) and divorces her after getting out of the Dar-ool Hurub, the divorce shall not be caused according to the second view taken by Aboo Yusoof, on whom be peace,

(because the *Nikah* has become cancelled); but according to his first view, the divorce shall be caused, and this is also the view of Mahomed, on whom be peace; (because the woman is observing her *Iddut*. See also paragraph 1097).

2799. (1899.) And when a woman becomes an apostate—My God save us from such a calamity—and joins the Dar-ool Hurub, and then her husband divorces her, and the woman then returns to the Dar-ool Islam as a Moslem, the divorce shall not be caused according to Aboo Haneefa, on whom be peace, by reason of the extinguishment of the obligation of the *Iddut* from her because of her having entered the Dar-ool Hurub (which entry amounts to civil death): but according to the view taken by his two disciples, on whom be peace, the divorce shall be caused, by reason of the obligation of the *Iddut* continuing on the woman (as a result of the dissolution of the marriage); and the divorce shall only be caused after her return to the Dar-ool Islam, (and shall not be caused as long as she continues to remain in the Dar-ool Hurub) by reason of the difference in the two Dars (that is, by reason of the husband and wife being in two different places as regards the governing laws; one place being the Dar-ool Islam and the other the Dar-ool Hurub. See paragraph 1098).

2800. (1900.) When a Moslem female minor has a husband, and the minor's parents forsake Islam,—may God protect us from such a calamity,—the minor does not become separate (or *bain*) from her husband; and if the parents join the Dar-ool Hurub taking her along with them, then the female minor becomes separate (or *bain*) from her husband (because the general rule is that, if one of the parents is a Moslem, the child follows the religion of the Moslem parent; and if both parents became infidels, then, as long as they are in the Dar-ool Islam, the children are Moslems, following the religion of the country—*Tubaan Lildar*; but when, in addition to being infidels, the parents leave the Mahomedan country, and go to the Dar-ool Hurub with the children, then the children cease to be Moslems altogether: this rule applies to infants when they do not understand Islam).

And if the father becomes an apostate—may God prevent such a calamity—and joins the Dar-ool Hurub with his minor daughter, the mother of the minor daughter dying in the Dar-ool Islam, either as a Moslem or an infidel, then the minor daughter shall not become separate from her husband (because she shall be in the religion of her mother, if

the latter was Moslem, and in the religion of the Dar-ool Islam if the latter was an apostate).

2801. (1901.) A female Christian minor is married to a Moslem; her father becomes a *Mujoosee* (or fire-worshipper), her Christian mother being either dead or alive: the female minor shall not become separate (or *bain*) from her husband (because the child follows the better of the two religions which its parents profess). But if both of her parents become fire-worshippers, then the female minor shall become separate from her husband, even if the parents do not take her away to the Dar-ool Hurub.

2802. (1902.) An adult female Moslem is married to a Moslem; she becomes an idiot (and therefore comes under the guardianship of her parents); and then both of her parents become apostate and join the Dar-ool Hurub with her; she shall not become separate from her husband. (The adult though an idiot does not follow her parents' religion).

2803. (1903.) A Moslem marries a Christian female minor, who has parents, both of whom are Christians; the minor then attains her majority and does not understand Christianity or any other religion, and cannot state the tenets of any religion: she shall become separate from her husband.

2804. (1904.) So also in the case of a female minor, who is a Moslem on account of her parents being Moslems; if she attains her puberty and does not understand Islam, and cannot state the tenets of Islam, she shall become separate from her husband just as if she had become an apostate (that is, whilst her parents are alive a female minor follows Islam which is the religion of her parents; but after attaining her majority she must know her religion; and not knowing what Islam is, she must be considered to have become an apostate after her majority). And for this reason the pious and the virtuous have considered it proper that the girl should be asked the tenets of Islam, and this is a laudable course; but it is proper that the question in regard to the tenets of Islam should be asked in a way (and in the form of leading questions) so that she might have no difficulty in stating those tenets (for instance, she should be asked,—"Do you know that there is one God?" "Do you know that Mahomed is the true Prophet?" and she shall not be asked as if she were being cross-examined thus—"What is religion," &c.), and if she says, "I understand Islam and I am able to state its

tenets but I will not state:" the learned lawyers have said that she shall become separate from her husband; because she has forsaken one of the pillars of Islam, and that pillar is to make profession (of Islam) by word of mouth when necessary, provided there is no (reasonable) objection; therefore she shall become an apostate. And if she says, "I understand what Islam is, but I am not able to state its tenets:" the learned lawyers have differed in this matter; some of them have said that she shall become separate from her husband, because ignorance is no excuse (and her inability to state the tenets shews she is ignorant of the tenets); but others have said that she shall not become separate, because in the case of one intoxicated, his becoming an apostate (by giving utterance to blasphemous expressions in a state of drunkenness) is not correct, reasoning from weak analogy (*Istihsan*), although the cause of the man's having become an apostate is a sinful act (that is, the act of drinking; because it is only when he is drunk that he has used blasphemous expressions which have induced apostacy) which he has committed of his own will (*Ikhtear*) and, therefore, it is proper, in a higher degree, that what this girl says should not be considered as rendering her an apostate.

2805. (1905.) When a boy has understanding, his apostacy cannot be disregarded (just as the apostacy of a grown-up man cannot be disregarded: but the acts of a mere child amounting to apostacy count for nothing); and the same establishes separation (between him and his wife) according to Aboo Haneefa and Mahomed, on whom be peace. So also the apostacy of a girl, who has understanding.

2806. (1906.) When a boy attains his majority whilst possessed of understanding and is unable to state the tenets of Islam, he becomes an apostate, except this that he shall not be put to death, just as in the case of a person, who has been compelled to accept Islam, if he accepts Islam (under compulsion) and then becomes an apostate, he shall be regarded as an apostate, but he shall not be put to death.

2807. (1907.) A Christian boy is given in marriage by his father to a Christian woman; the woman then becomes a Moslem; the Kazee shall not effect a separation between the husband and wife until the boy understands Islam; and when the boy is able to understand Islam, he shall be offered to accept Islam; and if he refuses to accept Islam, the Kazee shall effect separation between them; just as if he had been an adult (and his wife had become a Moslem) then Islam would have been offered

to him, and if he had refused to accept the same, separation would have been effected between the husband and the wife.

2808. (1908.) A husband and his wife, who are Moslems, both become apostate at once: separation shall not be caused between them, reasoning from weak analogy (*Istihsan*); so that if they again become Moslems, the marriage between them shall continue to subsist.

2809. (1909.) When a Zimmee (an infidel, who is Ahl-i-Kitab and is in the Dar-ool Islam) changes his religion for another (non-Moslem) religion, no objection shall be made to his doing so. And Shafei, on whom be peace, says, that the Zimmee (forsaking his own religion in preference to another infidel religion) shall be ordered to accept Islam or to go back to his old religion; and that if he does not do so, and three menses of his wife expire, she shall become separate from him.

2810. (1910.) An infidel woman, residing in the Dar-ool Hurub (and she is called a Hurubee whether she is Ahl-i-Kitab or not) comes out towards us (that is, towards the Dar-ool Islam) as a Moslem, having left behind in the Dar-ool Hurub: her Hurubee (or infidel) husband: separation shall be caused between them.

2811. (1911.) So also if the Hurubee husband comes towards us as a Moslem, leaving behind him his wife as an infidel in the Dar-ool Hurub, the woman (shall become separated from the husband and she) shall be obliged to observe the *Iddut* (her marriage having been dissolved), except when she (after the husband has left the Dar-ool Hurub) also comes out of the Dar-ool Hurub as a Moslem (even) without (much) inclination (on her part, for Islam) in which case (the *Nikah* shall not be dissolved or made *Fuskh*, and) the *Iddut* shall not be obligatory on her, according to Aboo Haneefa, on whom be peace, but his two disciples have laid down that *Iddut* shall be obligatory on her (her marriage having been dissolved).

2812. (1912.) So also if either the husband or the wife comes out of the Dar-ool Hurub as a Zimmee, separation shall be caused between them.

2813. (1913.) But if one of the spouses comes out of the Dar-ool Hurub (without actually becoming a Zimmee, but) under an assurance of toleration (or peace, that is, *Moostamin*), then separation shall not be caused between them (because he remains Hurubee all the same).

2814. (1914.) But if both the spouses come out of the Dar-ool Hurub, under the assurance of toleration, and the wife becomes a

Moslem, then, according to one tradition, she shall continue to be his wife until she has three menses (after she has accepted Islam; and after that the *Nikah* shall be dissolved); and according to another tradition, Islam shall be offered to the husband, and if he refuses to accept Islam, separation shall be caused between the husband and wife; but if the Imam (that is, the sovereign) does not offer Islam to him for his acceptance, then separation shall not be caused between them until she gets three menses.

2815. (1915.) When one of the spouses accepts Islam in the Dar-ool Hurub, (and neither of them comes into the Dar-ool Islam, and, therefore, there could be no offer of Islam to the one who is still an unbeliever), the separation between them shall be suspended until the expiry of three menses (and then the marriage shall become dissolved).

2816. (1916.) A Zimmee woman becomes a Moslem in the Dar-ool Islam; Islam shall be offered for the acceptance of the husband; and if he accepts it, so far so good (and their marriage relation shall continue to subsist); otherwise the Kazee shall cause separation between them, and this separation (which is caused by the husband's act of refusal) shall amount to a divorce, according to Aboo Haneefa and Mahomed, on whom be peace; but Aboo Yusoof, on whom be peace, says, that this shall not amount to a divorce (but it shall be a dissolution or *Fuskh*).

2817. (1917.) And if the husband becomes a Moslem (in the Dar-ool Islam) but his wife remains a Hurubee (or infidel) or a Mujoosee (or fire-worshipper); then Islam shall be offered to the woman; and if she accepts the same, so far so good, otherwise separation (which is not the result of the husband's act of refusal but of the wife's act of refusal) shall be caused between the husband and wife; and this separation shall not amount to a divorce: but if the woman is a Kitabya (*i.e.*, a Christian or a Jewess) then the marriage shall continue between them in its original state.

2818. (1918.) And the apostacy of one of the spouses does not amount to divorce (although the marriage is dissolved by the apostacy); but Mahomed, on whom be peace, says, that if the husband becomes an infidel, this shall amount to a divorce, drawing an inference, by way of analogy from the case where the (wife having become a Moslem) the husband refuses to accept Islam, (on the some being offered to him). God knows best.

CHAPTER VI.

ON LIAN.

[NOTE.—See Rudd-ool Moohtar, Volume II, page 963: Door-ool Mookhtar cited there, lays down as follows:—*Lian*, according to the Dictionary, is the infinitive of the past tense *Laana*. It is derived from *Laan* and that means to drive away. According to Shera it means the giving of evidence or testimony by the husband and wife, each in person, four times in the presence of the Kazee, such evidence or testimony having been strengthened by oath or *Ayman*, that is adjuration; the husband's evidence or testimony being further accompanied by the use of the word *Laan* or curse of God, and the evidence or testimony of the woman being further accompanied by the use of the word *Ghuzab* or wrath of God; the evidence or testimony of the husband standing in the place of Hudd-i-Kuzuf, so far as the husband is concerned—that is, the husband having accused the wife of *Zina*, he would have been liable to the punishment of Kuzuf or slander but for this procedure, and, therefore, the punishment for slander is extinguished and *Lian* takes its place—and so far as the woman is concerned, her evidence or testimony standing in the place of Hudd-i-*Zina*, that is, the punishment for *Zina* having become extinguished, *Lian* takes the place of the punishment for *Zina* so far as the woman is concerned—because to invoke God, when giving evidence, is more destructive in its effect than punishments; the condition for the validity of the *Lian* being the subsistence or continuance of the relationship of husband and wife, and that the *Nikah* is *Saheeh* that is good, and not *Fasid* or invalid; the cause or *Subub* of *Lian* is the husband accusing his wife of *Zina* under circumstance that, if such accusation had been made against a strange woman, it would make him liable to Hudd-i-Kuzuf, —that is to say, the wife should be *Moohsina* and *Afeefa*, that is, one not having the reputation of committing *Zina*. The pillars or Rookn of *Lian* are the evidence or testimony four in number, which is strengthened by the use of the oath on God and by the word *Laan*; the Hookm or consequence and effect of *Lian* is that, after the *Lian* is made, it is unlawful to the husband to have sexual intercourse with and enjoy the wife: the *ahl* or person fit to make *Lian* is a man who is qualified to give testimony to the detriment of and against a Moslem—and this condition excludes a Kafir and a slave &c., who cannot give such testimony].

2819. (1919.) *Lian* does not take place except between spouses who are both free, and both Moslems, and both possessed of understand-

ing, and both of age, and neither of whom has been punished for falsely accusing anybody else of adultery; because according to us (*i.e.*, Aboo Haneefa, Mahomed and Aboo Yusoof), *Lian* consists of acts of testimony (that is, consists of depositions) strengthened by oaths, and therefore *Lian* shall not take place, if the husband and wife are both not capable of giving testimony, or if one of them is not capable of giving testimony; and along with the capacity (or fitness) to give testimony, it is necessary to consider (*Iffut* or) chastity and (*Ihsan* or) virtue (by reputation and appearance) on the part of the woman.

2820. (1920.) And *Lian* takes place between two sinful (*Fasik*) persons and between two blind persons, because they have the capacity to give evidence, so that a marriage can be contracted in their presence: (*Fasik* means one who is guilty of *Goonah-i-Kubeera*, or grave sinful acts; here it excludes *Iffut* and *Ihsan*).

2821. (1921.) And the cause of *Lian* is the accusation, made (by the husband) against the wife, of adultery, the accusation being such that if made in reference to a stranger, it would have involved liability to punishment (that is to say, the rule is, that when a man accuses a strange woman of adultery, and proves the same by four witnesses, he discharges the burden; but when he makes the accusation and is unable to produce the required number of witnesses, he makes himself liable to *Hudd*; therefore, if the husband makes such accusation against his wife, and cannot produce the required number of witnesses, he brings an accusation by which he makes himself liable to *Hudd* if the woman accused had not been his wife; he must, therefore, in the case in question, make the *Lian*).

2822. (1922.) When, therefore, the cause of the *Lian* is established (that is, when the husband has made such an accusation against his wife) and the *Lian* is forbidden by reason of something (by way of disqualification) relating to the woman; such for instance as where, although the husband is free, and is possessed of understanding, and is a Moslem, and is of age, and has never been punished for bringing a false accusation of adultery against any person, but the woman is a slave, or an infidel, or a minor, or is insane, or dumb, or is not chaste, or if she is one whose husband has had intercourse with her on account of doubt, then the *Lian* does not take place, and the husband does not make himself liable to the punishment prescribed for making a false accusation of adultery (against such a woman).

But if the *Lian* is forbidden on account of something (by way of disqualification) which relates to the husband; then if the husband is one who is a fit subject of punishment, (*e.g.*, if he is not a minor, &c.), then the punishment of false accusation of adultery shall be meted out to him; because *Lian*, so far as he is concerned (that is, so far as his part in the *Lian* is concerned) takes the place of *Hudd* for false accusation of adultery (that is to say, the false accusation involves liability to punishment; but *Lian* comes to be substituted for it because the accusation is against the wife; and when the *Lian* cannot take place, the liability to punishment is revived); and it takes the place of *Hudd* or punishment for adultery so far as the woman's part in the *Lian* is concerned (that is, the accusation against the woman, if true would make her liable to *Hudd*, but *Lian* by her takes the place of such liability to punishment).

But if (the reason for the *Lian* being forbidden is, that) both of them have been punished for falsely accusing (some other person) of adultery, then (in the event of the husband accusing his wife of adultery) he shall be liable to punishment for false accusation of adultery.

2823. (1923.) And if the husband is not (as shown in the previous paragraph) a fit subject (*ahl*) for punishment or *Hudd*, then in the same way as *Lian* is not obligatory on him, so also he is not liable to *Hudd*.

2824. (1924.) And if the conditions of *Lian* are found to exist in the spouses (*e.g.*, freedom, or age, &c.), and the husband then (that is, after the husband has accused the wife of adultery) divorces the woman irreversibly, or divorces her thrice, the *Lian* shall be extinguished, and he shall not be liable to punishment. So also if he marries her after this (divorce). But if he gives her a reversible divorce, then the *Lian* shall not be extinguished.

2825. (1925.) And the mode of making *Lian* is that declared (in the form of a *Nuss*) by God in the Koran. (See Volume I, Tagore Lectures, page 46, Texts 314, 315, 316 and 317).

2826. (1926.) A man accuses his wife of adultery, and both of them are fit subjects to make *Lian*, and the woman does not refer the matter (of the accusation) to the Kazee; she shall continue to be his wife; and if she refers the matter (of the accusation) to the Kazee, then the Kazee shall begin with the man, and make him take the oath as God has laid down in His Book. And Husun, on whom be peace, has reported a

tradition from Aboo Haneefa, on whom be peace, that he (Aboo Haneefa) held as a condition that words of direct address (by the husband to the wife) shall be used, and that the husband shall say, "In what I have accused *thee* of *Zina* (I am truthful)." And Kurkhy, on whom be peace, has laid down that when the husband uses the words of an indirect expression (speaking of the woman as if she were absent, although both parties are present before the Kazee) but points towards the woman, this is sufficient.

The woman shall then (that is, after the oath has been administered to the husband and he has made his statement) be put on her oath.

2827. (1927.) And whichever of the two persons refuses to make *Lian*, the Kazee shall imprison that person, until that person makes the *Lian* as that person's companion has done. And Shafei, on whom be peace, has laid down that, when the woman refuses (to make *Lian*) after the husband has made the *Lian*, then the punishment or *Hudd* of *Zina* shall be meted out to her.

2828. (1928.) And if the woman makes a claim that her husband has falsely accused her of adultery, and the husband denies having made such an accusation; and the woman establishes proof by witnesses to substantiate her claim that the husband has made the accusation of adultery, then the Kazee shall order them both to make *Lian* between them according to us (the followers of the three Imams); because what is proved by (*Byyuna* or) proof by witnesses is similar to what is proved by eyesight: (here the witnesses having proved that the husband had made the false accusation, this proof is just as good as if he had admitted the accusation, and as if he, the Kazee, had been himself an eye-witness of the accusation).

2829. (1929.) And if both the husband and wife have made *Lian*, and have each performed their respective part in the *Lian*, the Kazee shall effect separation between them; and this separation (by the Kazee) shall amount to (a *bain*) divorce; and the woman shall be entitled to maintenance and residence as long as she remains in her *Iddut*. And until the Kazee shall have effected a separation between them, the woman shall continue to be his wife, according to us.

2830. (1930.) And if the husband repudiates the pregnancy of his wife, saying that the pregnancy is due to adultery (instead of saying "Thou hast committed *Zina*" or of saying after delivery, "The child born is not mine,") then according to us (the rule is that) the husband shall not at pre-

sent (or immediately) be liable to punishment (for *Kuzuf* or falsely accusing his wife of adultery) and shall not (be obliged) to (make) *Lian* (because it cannot be said with certainty that there is pregnancy at all at the time the husband denies the pregnancy as being due to him); and if she gives birth to a child, at (or after) six months (from the time of the repudiation of the pregnancy) then the same rule shall hold good, on account of the possibility that the child has been conceived after the repudiation; but if she gives birth to a child in less than six months (from the date of the repudiation) then the same rule holds good according to Aboo Haneefa, on whom be peace; but according to the view taken by his two disciples the Kazee shall (in this last case) order the parties to make *Lian* (after the birth of the child, which has taken place less than six months after the repudiation of the pregnancy as aforesaid); and the Kazee shall make the child obligatory on the woman (that is to say, he shall assign the child to the woman, and the child's *nusub* shall not be established in the husband, but the child shall only be the mother's child).

[See Hidaya, Volume II, page 323, and Shureh Vikaya, Volume II, page 90. There is a great deal of difference between the husband attributing *Zina* to his wife and denying the paternity of the child actually born, and between his denying the pregnancy as being due to him. By attributing *Zina* and denying the paternity of the child actually born, the husband makes *Kuzuf* to a certainty; but by denying the pregnancy, the husband does not necessarily make *Kuzuf*; because there is no certainty that what is apparently a pregnancy is really a pregnancy. But Aboo Yusoof and Mahomed say, that although at present there is no certainty regarding the pregnancy, still if the child is born within six months from the date of the denial of the authorship of the pregnancy by the husband, then it is certain that at the time of such denial there was real pregnancy; therefore such birth within six months shews that there was no doubt that the accusation or statement made at the time did amount to *Kuzuf*; that is to say, that the husband in denying the authorship of the pregnancy really made *Kuzuf*; the Kazee, therefore, when this certainty is attained, that is, after delivery, shall order a *Lian* to be made between the parties. But Aboo Haneefa says, that although actual delivery within six months from the date of the denial shows that at the time of the denial there was pregnancy, but this certainty is only attained after delivery and not before delivery, and, therefore, the denial of pregnancy does not, at the time of the denial, amount to *Kuzuf*; and that if the denial should amount to

Kuzuf after delivery, then it would amount to making *Kuzuf* dependent on a condition, just as if the husband were to say to his wife, "If thou hast pregnancy it is not from me," and it is not permissible to make *Kuzuf* dependent on a condition, for reasons explained in the Inaya, Volume II, page 259].

2831. (1931.) A woman gives birth to two children of one womb (or *butun;* that is to say, she gives birth to twin children; twin children are defined to be children between whose births from the same mother there is an interval of less than six months); and the husband admits the first child and denies the second: the Kazee shall make the (second) child obligatory on the father (that is, the *nusub* of both shall be established in the father; because when he has admitted the first child to be his, then the second child born in less than six months must also be his) and shall order him to make *Lian* with the woman (for the purpose of completing the *Lian* for the attainment of its primary object as laid down in paragraph 1929); and if he denies the first child and admits the second, both children shall be obligatory on the father, and he shall (in this case) be liable to the punishment for making a false accusation of adultery (because by admitting the second child he himself falsifies his statement regarding the first). And if he denies both the children, and one of the children dies before *Lian*, then the husband shall make *Lian* as regards the child who is alive (that is, the living child shall be referred to in the oath which constitutes *Lian*, the husband saying, "It is not my child") and both shall be considered to be his children.

So also if she gives birth to two children, one of them having been born dead (or still-born), and the husband denies both the children: both the children shall become obligatory on him, and the Kazee shall order both the husband and the wife to make *Lian* as regards the living child.

And if the wife gives birth to one child, and the husband denies the child, and the Kazee directs the husband and wife to make *Lian* as between them, and then the woman on the next day (after the *Lian*) gives birth to another child, both the children shall become obligatory on the husband, and the (previous) *Lian* shall (continue to) be in force. And if the husband after this says, "Both of them are my children," he shall be believed, and he shall incur no liability to punishment.

[NOTE.—I—Until the master makes a claim, the first child of a slave girl by the master does not belong to him, the master, *i.e.*, the child's *nusub* is not established in the master until he makes a *Daiwut*, or claims the child to be his: and his silence does not amount to a *Daiwut* On this point, see Volume II, Tagore Lectures, page 43, paragraph 101. But the child born in a marriage state belongs to the husband without a *Daiwut:* and he must expressly repudiate the child if his object is to cut off the child's *nusub* from him: his silence, therefore, extinguishes his right to repudiate the child; for this proposition, see Futh-ool Kadeer, Volume II, page 317, line 14, &c. II—The repudiation of a child born in wedlock must, in order to be effective, be made at the time of the birth of the child or within the time of congratulation, which time is either three or seven days: there are other details in this matter. For this, see Futh-ool Kadeer, Volume II, page 317, line 16, &c. III—After the repudiation, the husband must make *Lian*, in order that the *nusub* of the child repudiated should be cut off from him. For this proposition, see Volume I, Futawai Alumgeeri, page 703, lines 9 to 13. IV—If a child is born, and the husband repudiates it, and the child then dies, the *nusub* of that child cannot be extinguished from the husband, because—and for this proposition, see Futh-ool Kadeer, Volume I, page 318, line 11—the child by its death has ceased to exist, and has become *Moostughni* or relieved from every want or need for which the child could look up to the father, such as maintenance, &c., the reason for extinguishing the *nusub* being to extinguish the father's liability to maintenance, &c.; and therefore the child's *nusub* from the father shall not be extinguished in such a case. V—If, therefore, twins are born, and both are repudiated after their birth, and one child dies before *Lian;* or if, of the two children born as twins, one is still-born, the *nusub* of the living child shall not be extinguished after the *Lian;* because the dead child's *nusub* not being extinguished as stated above, the *nusub* of the living child cannot be extinguished, both having been born of one *butun* or womb. See paragraph 365, Volume II, page 138 of the Tagore Lectures. VI—If the husband denies the paternity of a child, and a *Lian* also is made in reference to that child,—which *Lian* requires the extinguishment of the *nusub* of the child,—and if on the second day from the *Lian*, another child is born, within six months from the birth of the first child, thus shewing that the children are, in reality, twins, then, whether the second child is repudiated by the husband or not, the *nusub* of both the children shall be estab-

lished; because—see Futh-ool Kadeer, Volume II, page 318, line 13—the extinguisher or Katai of *nusub* being *Lian*, and no *Lian* having been found in reference to the second child, the second child's *nusub* becomes established in the father,—and no fresh *Lian* in reference to the second child can take place, because the woman has ceased to be his wife by reason of the first *Lian*, the *Iddut* even having expired with the birth of the second child—therefore the *nusub* of the first child shall also be established in spite of the *Lian*, because both the children were conceived in the same womb: the first *Lian* is not extinguished but continues to subsist; what becomes extinguished is the consequence or the result of the first *Lian* on the first child.]

2832. (1932.) And as long as both the parties making the *Lian* continue (after the decree of the Kazee) in their *Lian* (that is, as long as they persist in the truth of their *Lian*, and do not withdraw their statements, and as long as their capacity and fitness for *Lian* subsist), it is not competent to the husband to marry the wife. And if the husband, who has made the *Lian*, falsifies himself after making the *Lian*, it is competent to him to marry her according to Aboo Haneefa and Mahomed, on whom be peace. [NOTE. There is a tradition of the prophet to the effect that the Mootlainan, or those who have made *Lian*, cannot be joined together for ever: Aboo Haneefa and Mahomed say, that the parties are forbidden to come together as long as they come under the description of "Mootlainan or those who have made *Lian*;" but as soon as that description ceases to be correct and apposite in regard to them and becomes inapplicable to them, they can marry each other. But Aboo Yusoof holds that they cannot for ever marry each other; and the unlawfulness or *Hoormut* which comes to be established between them by reason of the *Lian* is like that of fosterage, *viz.*, perpetual unlawfulness. See Futh-ool Kadeer, Volume II, page 312, line 11].

2833. (1933.) And so if the woman after having made the *Lian* (becomes incapacitated, and) gets into a state so that if that state had existed before, the *Lian* could not have been made between them (see paragraph 1919); as for instance, if she commits adultery or what is similar to this, it shall be competent to him to marry her.

2834. (1934.) And if the woman confirms her husband, before he makes the *Lian*, the *Lian* shall drop (*i.e.*, the Kazee shall not direct the

parties to make *Lian* between them), and the woman shall not be liable to punishment.

2335. (1935.) And when the husband has made the *Lian* (only) thrice (instead of five times) and the woman has done the same, and the Kazee has effected a separation between them, the separation so effected by him shall be valid, and the majority of the number (that is, three) shall be held to take the place of the full number (that is, five); but the Kazee's action shall amount to a departure (and a dereliction) from the mode prescribed by the *Soonnut*.

2336. (1936.) And if the Kazee effects a separation before the greater number of the *Lian* has been made between them, the separation, effected by the Kazee, shall be void.

God knows best.

CHAPTER VII.

SECTION I.

ON IDDUT.

[NOTE.—(I). See Door-ool Mookhtar as in Rudd-ool Moohtar, Volume II, page 984, &c. According to the Dictionary *Iddut*, means to count, and *Ooddut* means to prepare and make arrangement for something. *Iddut*, according to the *Shera*, means waiting such as becomes obligatory on a woman (page 985) or on a man, when the cause of waiting is found: and the occasions for a man to wait are (A) *twenty*, and they are mentioned in the Khuzana: and the sum and substance of what is stated in the Khuzana points to this that, whenever it is unlawful that a woman should be married to a man (page 986) *on account* (B) *of some prohibition*, it becomes necessary that the prohibition should be removed (in order that the marriage when it takes place should be valid); as for instance, the marriage of the wife's sister or of four women in addition to the wife.

(II). And according to its technical meaning, *Iddut* means waiting, which becomes obligatory on a woman or on the guardian of a female minor at the time when the marriage becomes (*Zail* or) broken; and, therefore, there is no *Iddut* for *Zina*: or when the *Shoobha* or doubt of marriage becomes (*Zail* or) removed; as for instance, a *Fasid* or invalid marriage and (for instance) a woman, who has been sent to a man different from her

husband . . . . . (page 999). And (C) *the Iddut of a woman* who has been married by a *Fasid* (or invalid) marriage (is reckoned by menses);—(D) *and therefore there is no Iddut in a batil or void marriage;* and so also there is no *Iddut* in a marriage which is dependent before (*i.e.* on) permission; (E) *Ikhtear* اختيار, (page 1,000) although safety (or *Suwab*) lies in holding that there should be *Iddut* and *nusub* (in a dependent marriage), see Buhur—and the *Iddut* of (F) *a woman with whom sexual intercourse was had from doubt* (is reckoned by menses),—(G) *and to that class belongs the marriage of a woman who is the wife of another* when the (new) husband does not know the condition of that woman (that she is the married wife of another) . . . . . —are reckoned by menses.

(III). Rudd-ool Moohtar, Volume II, page 985 (comments as follows): the expression (A) "*twenty.*" And these are—(1) the marriage with the wife's sister; or (2) with her father's sister; or (3) with her mother's sister; or (4) with her brother's daughter; or (5) with her sister's daughter; or (6) with a fifth wife; or (7) to bring a slave girl over a free woman; or (8) to marry the sister of a woman with which woman intercourse was had in a *fasid* or invalid marriage, or in a doubt of marriage; or (9) to marry a fourth woman in a like way; that is, if a man has three wives, and he has intercourse with another woman in a *fasid* marriage or in doubt of marriage, then it is not competent to him to marry a fourth wife until the expiry of the *Iddut* of the woman with whom he has had such intercourse; or (10) the marriage with a woman who is observing her *Iddut* with reference to a stranger (*i.e.*, with reference to another man); but a man can marry his own wife who is observing her *Iddut* on account of (divorce from) him; or (11) the marriage with one's own wife who has been thrice divorced, that is to say, before the Moohullil's aid has been brought into requisition; or (12) to have sexual intercourse with a slave girl whom a man purchases, before her period of purity (*istibrai*); or (13) to have sexual intercourse with a woman who is pregnant from *zina*, if a man marries her, that is marries her before delivery; or (14) to have sexual intercourse with a Huruby woman when she becomes a Moslem in the Dar-ool Hurub and makes *Hijrut* towards us, and she is in a state of pregnancy and a man marries her; that is, to have sexual intercourse before delivery (is prohibited); or (15), a Musbeea or a woman who has been taken a prisoner (in the Dar-ool Hurub, on the occasion of a *Jehad*), cannot be had sexual intercourse with, until she gets her menses, or until the expiry of one month if she gets no courses by

reason of being too young or too old; or (16) the marriage of a *Mookatuba* with her Moula until she gets her freedom; or (17) sexual intercourse with a *Mookatuba* by her Moula until she becomes incapable of earning her freedom; or (18) the marriage—with an infidel; or (19) with a *Moortud*, or an apostate from Islam; or (20) with a *Mujoosee*—is not valid until the infidel, or the *Moortud* or the *Mujoosee* becomes a Moslem.—Buhur.

(IV). Rudd-ool Moohtar, Volume II, page 986. The expression (B), "*on account of some prohibition;*" such for instance as the right of another arising from marriage or from *Iddut*; and such for instance as the bringing of a slave girl over a free woman; and such for instance as exceeding the number four, and the joining together of the *Maharim*; or when the aid of the Moohullil is necessary, or when it is necessary to wait for the purification of the womb (in the case of the purchased slave girl).

(V). Rudd-ool Moohtar, Volume II, page 999. The expression (C), "*and the Iddut of a woman who has been married by a Fasid marriage:*" This is a woman who has been married without witnesses. Also the marriage with the wife of another without a knowledge of the fact that she is (already somebody else's) wife; and the marriage with a *Maharim* with the knowledge of her being unlawful, is *Fasid* according to Aboo Haneefa, but his disciples have differed from him (holding that the marriage is *batil*)—Futuh.

(VI). Rudd-ool Moohtar, Volume II, page 999. The expression (D) "*and therefore there is no Iddut in a batil or void marriage.*" As regard, this, it is to be stated that there is no difference between *Fasid* and *Batil* in the matter of marriage, contrary to the case of a sale, as mentioned in (the Book on) marriage by Futuh and by the Manzooma which will be noticed later on. But it is stated in the Buhur (ool Raik) from the Moojtuba that every marriage where the *Ooleemas* have differed in regard to its validity, as for instance, a marriage without witnesses, sexual intercourse in such a marriage renders *Iddut* obligatory; but that with regard to marriage with the married wife of another and with the wife of another who is observing her *Iddut*, sexual intercourse in such a marriage does not render *Iddut* obligatory, if the husband knows (at the time of the marriage) that the woman is the married wife of another or is observing her *Iddut* from another; because no person admits the validity of such a marriage, and, therefore, the marriage shall be held as not having at all taken place; and that, therefore, it is necessary that a distinction should be made between a *Fasid* and a *Batil* marriage in regard to (the necessity

for the observance of) the *Iddut*; and that for this reason punishment is obligatory (when the man marries) with the knowledge of its unlawfulness, by reason of the intercourse in such a case being a mere *Zina*, as stated in the Kinya and other books I say that a difficulty (or objection) arises against the Buhur-ool Raik, that the marriage with a *Maharim*, with the knowledge that the woman is not lawful, is *Fasid*, as you know, although no Mussulman admits of the validity of a marriage with a *Maharim*. And it is already laid down in the Chapter on Dower that sexual intercourse in a *Fasid* marriage renders *Iddut* obligatory, and establishes the *nusub*. And the Buhur-ool Raik (itself) has given as instances of a *Fasid* marriage, a marriage which takes place without witnesses and a marriage with two sisters at once, and a marriage with one sister in the *Iddut* of another sister, and a marriage with a woman who is observing her *Iddut* from another man, and a marriage with a fifth during the *Iddut* of the fourth wife, and a marriage with a slave girl upon a free woman.

(VII). Rudd-ool Moohtar, Volume II, page 1,000. And his expression, (E) *Ikhtear*. And similar to it is to be found in the Mooheet in which the argument is, that *nusub* is not established by it (*i.e.*, by the *Nikah-i-Moukoof*) because the *Nikah* is *Moukoof* (or dependent); and therefore the *Nikah* has not been contracted in regard to the results (*Hookm*) which arise from the *Nikah*; therefore the *Nikah* shall not have the effect of producing *Shoobha-i-milk*.

(VIII). Rudd-ool Moohtar, Volume II, page 1,000. And his expression, (F) *"a woman with whom sexual intercourse was had from doubt."* As for instance, a woman who has been sent to a man different from her husband; and for instance, a woman who was found in the night in the *firash* or bed of the man when he (the man in the latter case) claims a doubt (that is, the man says I found her in my bed, and I thought she was my wife: if he believed she was not his wife, the connexion was that of *zina*; if he claims doubt, and says I thought perhaps she may be my wife, this is doubt of ownership). So is it laid down in the Futuh.

(IX). And in the Nuhur it is stated in a discussion that to this class belongs a woman as regards whom Futwa was asked from the *Oolesmas*, the case stated being that of a man who purchases a slave girl, and has sexual intercourse with her, and the woman afterwards proves that she had been initially a free woman—. And this is clear.

(X). And to this class belongs the case where a man has sexual intercourse with his own *Motudda* from doubt; and the case of a *Motudda* will presently be discussed.

(XI). And to this class belongs what is related in the books of Shafei when a woman * * * * * * * * * * whether she considers * * * * * * * * * * ; she is obliged to observe *Iddut*, as a *Moutooa* from doubt is obliged to observe *Iddut*. It is said in the Buhur, "I have not found what our As'habs (Aboo Haneefa, Mahomed and Aboo Yusoof) have laid down in this matter; although the rules of the *Shera* are not inconsistent with what is held by Shafei; because *Iddut* is obligatory for the purpose of ascertaining whether the womb is pure."

(XII). Rudd-ool Moohtar, Volume II, page 1,000. And the expression, (G) "*to that class belongs the marriage of a woman who is the wife of another.*" That is, to the class where sexual intercourse is had from doubt.

(XIII). It is stated in the Nuhur, "And the author of the Shuruh-i-"Sumurkundy (a Commentary on the Tunweer-ool Absar) has brought the "*Munkooha* of another under the *Moutooa* from doubt; because, says "the author, '*Moutooa* from doubt means either from doubt of ownership "'*i.e.*, *milk*, or doubt of contract, *i.e.*, marriage; in this way that a "'woman different from the wife is sent to the husband, and he has "'intercourse with her; or when a man marries the *Munkooha* of another "'man without knowing her position:' and thou knowest that "to include the *Munkooha* of another man under the class of *Moutooa* "from doubt, shews the redundancy of the class of *Munkooha fasidun*; "because there is no doubt in this that the *Munkooha* by a *Fasid* marriage "is a woman with whom sexual intercourse was had from doubt of "marriage; nay rather the *Munkooha* by a *Fasid* marriage can be "better said to involve doubt of marriage than the *Munkooha* of "another man; because the condition that there should be witnesses to a "marriage is one in regard to which there is a difference amongst the "*Ooleemas*; but, on the contrary, there is no difference that the woman (to "be married) should be free from the marriage of another."

(XIV). When thou hast known this, then thou must also know that the commentator (*i.e.*, *Door-ool Mookhtar*) is the follower of that which is in the Shuruh-i-Sumurkundy, and not an opposer of the same; because if he intended to oppose it, he would have mentioned his expression

(G) "Minho" (or to that class belongs,) up to the end, after his expression, (C) "*Munkooha* from *Fasid* marriage," and not after the expression (F) "and *Moutooa* from doubt." Take note of this.

(XV). And it is possible to answer on behalf of the Sumurkundy in this way that the Door-ool Mookhtar has placed the *Munkooha* by way of a *Fasid* marriage in a class where a condition of validity is wanting after the existence of the Muhulleeut (or fitness of the subject matter); as for instance, the *Nikah-i-Mowukkut*, and the *Nikah* without witnesses. But as regards the *Munkooha* of another, she is not at all a *Muhul* (or fit subject) of *Nikah*; because it is not possible that there should be a union of the ownership of two persons at one and the same time as regards one and the same person, and, therefore, marriage with the *Munkooha* of another does not create even *fasid* ownership; although that marriage does create doubt (and, therefore, she comes under *Moutooa bil Shoobha*).

(XVI). And the Door-ool Mookhtar is a great follower of the Nuhur, and he might have disagreed from the Nuhur for the reason mentioned by me (that in a *Fasid* marriage, the *Muhul* has the capacity of marriage, but a condition of validity is wanting: but the *Munkooha* of another is not the *Muhul* with the capacity of marriage: but *Iddut* is obligatory from *Shoobha* of marriage)].

2837. (1937.) Women, who must observe the *Iddut* (or *Motudda* women) are of three classes:—I Those who have been divorced,—II Those with whom sexual intercourse was had from doubt,—III And those whose husbands have died.

2838. (1938.) And the observance of *Iddut* is sometimes with reference to menses, and sometimes with reference to months, and sometimes with reference to the delivery or the miscarriage of a child, entirely or partially formed.

2839. (1939.) As regards the divorced women: A man marries a woman by a valid (or *Jais*) marriage, and divorces her after having sexual intercourse with her, or after a valid retirement: the woman is bound to observe the *Iddut*.

2840. (1940.) And the explanation of what constitutes a valid retirement has been given in the book on Marriage (see paragraph 487, Volume II, page 193 of the Tagore Lectures).

2841. (1941.) And if the retirement is invalid, then, if the invalidity (of the retirement) arises on account of something relating to the Shera, although the husband is really able to have sexual intercourse, as for instance, fasting of the Furz class and the prayers likewise of the Furz class, and Ihram, then the woman is obliged to observe the *Iddut*. But if the invalidity of the retirement arises from the husband's inability to have actual sexual intercourse, then the woman is not obliged to observe the *Iddut*. And so (shall the *Iddut* not be obligatory) if the husband divorces her before retirement.

2842. (1942.) And the *Iddut* of divorce is sometimes regulated with reference to menses, and sometimes with reference to months, and sometimes it is regulated (that is, determined) by delivery.

2843. (1943.) And if the husband divorces his wife whilst she is in her menses, it shall be obligatory on her to observe her *Iddut* for three full menses, and this particular one shall not be counted as constituting part of the *Iddut* (not being a full and entire one), just as it is not counted in (*Istibrai* or) considering whether the woman's womb is pure or not; (that is, if a man purchases a slave girl, it is necessary for him to wait until she gets her menses, in order to see whether her womb is pure and free from fœtus; and if the purchase is made whilst she is in her menses, the particular menses counts for nothing).

2844. (1944.) And if the marriage was invalid (or *Fasid*), and the Kazee has effected a separation between the spouses, then, if the Kazee has effected a separation before the husband has had intercourse with the wife, it is not obligatory on her to observe the *Iddut*. And so (is the *Iddut* not obligatory) if the Kazee has effected separation after the (*Khilwut* or) retirement (if the marriage was invalid). And if the Kazee has effected separation after the husband has had intercourse (in a case of invalid marriage) it is obligatory on the woman to observe the *Iddut* from the time of the separation, and not from the time of the intercourse.

So also if the separation has taken place without an order of the Kazee (that is, in a case of invalid marriage, in which the husband has of his own accord, without the intervention of the Kazee, effected the separation, if the separation has taken place before intercourse, *Iddut* is not obligatory; if the separation has taken place after retirement, it is also not obligatory; but if it has taken place after intercourse, it is obligatory from the time of the separation, and not from that of intercourse).

2845. (1945.) And if the divorced woman is a minor (who gets no menses) or is an *Ayasa*, (that is to say, a woman who has attained an age when she is past having menses) and is a free woman, then her *Iddut* is three months.

2846. (1946.) The learned lawyers have differed, as to what constitutes the limit of *Ayaas* (or age when the woman is past having menses): some of them have said that if the woman is fifty-five years of age and gets no menses, then she is an *Ayasa*, whether she is a Turkish woman (who has a strong constitution) or other than a Turkish woman: and the Fatwa is given accordingly.

2847. (1947.) And a woman, who does not get her menses, is similar to a minor, and she shall observe her *Iddut* reckoned by months.

2848. (1948.) And if she (that is, a minor, or an *Ayasa*, that is, one who never gets her menses) is divorced on the first day of the month, she shall observe her *Iddut* for three lunar months. And if she is divorced in the midst of the month (that is, after the commencement of the month) then Aboo Haneefa, on whom be peace, says, that she shall observe her *Iddut* for three months, counting the number of days, each month being taken to consist of thirty days; and his two disciples have said that she shall observe her *Iddut*, after the expiry of the remainder of the month in which she has been divorced, for two months according to the moon, and shall complete the first month taking it to consist of thirty days, and making up the number of deficient days in the last month. And cases of this kind are numerous.

2849. (1949.) And if the woman, observing her *Iddut* on account of divorce, or on account of sexual intercourse from doubt, or on account of death, be pregnant, then her *Iddut* shall be the delivery, whether she was pregnant at the time the *Iddut* became obligatory, or she became pregnant after such obligation arose (*e.g.*, when she becomes pregnant by *Zina* or in any other way).

2850. (1950.) And if the pregnant woman (referred to in the preceding paragraph) is delivered, then at the time when the major portion of the body of the child is out of the womb, the learned lawyers have held that, in case the divorce was reversible, the right to make *Rujaat* (or to take back the wife) comes to an end (on account of the expiry of the *Iddut*) but it is not lawful for her to marry (at that time, that is, whilst the major portion of

the body of the child is out of the womb) out of precaution (to allow the *Iddut* to expire fully by the entire body of the child being brought forth).

2851. (1951.) And if the woman (referred to above) gives birth to two children out of one womb, so that the space of time between their births is less than six months, her *Iddut* shall expire with the birth of the second child, and not with that of the first child.

2852. (1952.) And if the woman who is observing her *Iddut* (on account of divorce or intercourse from doubt) is owned by somebody else, whether she be a slave (pure and simple) or a *Moodubbura* or a *Mookatuba* or an *Oomm-i-wulud*, and if she belongs to the class of women who get menses, then her *Iddut* in the case of divorce (from her husband) or in the case of sexual intercourse (by somebody else, arising from doubt), shall consist of two menses: but if she belongs to the class of women who (do not get menses but who) calculate (their *Iddut*) by reference to months, then her *Iddut* shall consist of one and a half months; and if she is pregnant, then her *Iddut* shall be her delivery from pregnancy.

2853. (1953.) And an *Oomm-i-wulud*, who has been emancipated by her Moula (or master), or whose Moula is dead, shall observe *Iddut* for three menses (like free women).

2854. (1954.) And if an *Oomm-i-wulud* has become unlawful to her Moula for any cause (*e.g.*, kissing with desire his son) it is not obligatory on her to observe *Iddut*, until she is emancipated by her master, but the Moula shall lose the right to call her to his bed (*Firash*) on account of the unlawfulness (or *Hoormut*); so that if she gives birth to a child at (or after) six months from the time of the unlawfulness, the *nusub* of the child shall not be established in the Moula, as long as the Moula does not (make *Daiwut* or) claim the child.

2855. (1955.) A male slave of the *Mookatub* class, purchases his wife (that is, purchases the woman, who is his wife, but who had been a slave before, from her master), his marriage shall not become invalid (because the purchase enures to the benefit of his own master); and if the *Mookatub* is unable to earn his own freedom, then the slave (the said Mookatub) and his wife shall continue in their marriage state, because both of them become the property of the Moula; but if the *Mookatub* earns his freedom (*i.e.*, earns money sufficient to get his freedom according to the stipulation with his master), and becomes free, his marriage shall become invalid (because now the slave has become a free

man, and the woman becomes his property) but *Iddut* shall not be obligatory on the wife, because the woman becomes lawful to her husband by right of ownership (and, therefore, the husband shall continue to live with her, and there shall be no occasion for the *Iddut*).

And if the *Mookatub* dies after purchasing his wife; then if he dies whilst he is incapable of earning his freedom, his freedom becomes void (that is, during the last flickering of life, it is to be held that on account of incapacity to earn his freedom, he has reverted to his original state of bondage), and both the slave and his wife shall become the property of the Moulas therefore, the slave so dying is a man who dies leaving him surviving his wife who is a slave of her deceased husband's master), and, therefore, she shall observe *Iddut* for two months and five days (that is, half the time in regard to a free woman), whether her husband has had sexual intercourse or not. But if the *Mookatub* dies after satisfying what was stipulated for as the return for his freedom, then his marriage with his wife shall become invalid (or *fasid*), because he became free at the very last moment out of the moments of his life, and at that moment became the owner of his wife's person (and the *Nikah* became cancelled); and therefore if he had no sexual intercourse with his wife, then no *Iddut* is obligatory on her (because there is no *Iddut* when the marriage is *cancelled* without having been consummated; and there is no *Iddut* on account of death, because the *Nikah* became cancelled before his death): but if the husband has had sexual intercourse with her, then, if she has given birth to a child by him, she shall observe her *Iddut* for three menses, because she is, in such a case, an *Oomm-i-wulud*, and becomes a free woman by the death of her master; but if she has not given birth to a child from him, then she must observe *Iddut* for two menses, because the marriage between them became (*Fasid* or) invalid before (her husband and master's) death.

2856. (1956.) And the *Iddut* consequent on the death of the husband, as regards a free woman, is four months and ten days. And it is reported from the Sheikh-ool Imam, the most respectable Aboo Baker Mahomed, son of Fuzul, on whom be peace, that his view was that the woman shall, observe her *Iddut* for four months and ten nights, because God the Most High has made use of the word ten in the male gender; and it is the plural of nights which is spoken of by the use of the male gender (in the numbers such as, three, four, &c.), and the plural of days is spoken of by the use of the female gender (in the numbers such as three, four, &c.). Therefore,

according to the view taken by the said Sheikh-ool Imam, the woman's *iddut* gets increased by one night, and this view is more consistent with precaution. (See Volume I, page 10, Text 62 and 58 within brackets).

2857. (1957.) And if the woman is a slave girl (belonging to somebody else) then her *Iddut* (after her husband's death) consists of two months and five days.

2858. (1958.) And if a woman is pregnant, then her *Iddut* (in the case of the death of the husband or of divorce, or in any other case) is up to delivery, whether she be a free woman or a slave girl.

2859. (1959.) A boy (that is, an infant) dies, and his wife is pregnant, and the pregnancy is visible (so that it is quite clear that she could not have conceived from her husband) her *Iddut* shall last up to her delivery reasoning from weak analogy (*Istihsan*): and Shafei, on whom be peace, says, that such a woman shall observe her *Iddut* with reference to months (calculated from the husband's death; that is, she shall observe the *iddut* in regard to the husband's death—the pregnancy being disregarded. See Fatawai Alumgeeri, Volume I, page 715, last line citing from the Hedaya, *nusub* shall not be established in the husband); and that is also a tradition from Aboo Yusoof, on whom be peace; but if such a woman conceives after the death of her (infant) husband, then she shall observe her *Iddut*, according to months, according to the view taken by them (*i.e.*, Aboo Haneefa, Mahomed and Aboo Yusoof).

2860. (1960.) And a woman, whose husband is dead, and who has been divorced by her husband (that is, where the husband, before his death, divorces his wife), if she inherits to her husband, who has divorced her (that is, if the divorce was given while the husband was in the last extremity of sickness, and the divorce was prompted by the desire to disinherit the wife, and this case is called the case of *Farr-bil-Talak*, or, in other words, the husband runs away to avoid his wife getting the inheritance)—shall observe her *Iddut* for the longer of the periods prescribed on account of the *iddut* arising from divorce and death respectively; (*e.g.*, if the woman is in the habit of getting her menses, and gets the same regularly every month, then her *iddut* arising from her husband's death is four months and ten days; but her *iddut* arising from the divorce by her husband is, under the circumstances, three menses; therefore the longer period is four months and ten days; and that shall be the *iddut* in the present case).

And the explanation of this matter is, that the woman shall observe the *iddut* for four months and ten days (which is the *iddut* for death) so that there should be three menses in the said period; so that if she has observed her *iddut* for four months and ten days, and does not get her menses (that is, does not, within the said period of four months and ten days, get menses at all, or does not get three menses) then she shall observe her *iddut* as long as she does not get three menses (this is an instance where the *iddut* of divorce is the longer of the two *idduts*) : but if she gets three menses before the completion of four months and ten days, then her *iddut* shall not expire until the period of four months and ten days shall have expired.

And Aboo Yusoof, on whom be peace, says, that the *iddut* of the wife of a *Farr* (or running away) husband, expires with three menses.

And we shall presently discuss the cases of *Farr* in a separate section. (See paragraph 2017, &c.).

2861. (1961.) So also when a man divorces one of his two wives particularising the one divorced, after having had intercourse with them, and both of them belong to that class of women who get menses; and the husband then dies, and it cannot be found out which wife was divorced as aforesaid (there being a dispute as to which of them was named or pointed out and particularised at the time of the divorce), it is obligatory on each of them to observe the *Iddut* for the period prescribed for the death of the husband, such that three menses must also be completed within that period.

2862. (1962.) So also if the husband, whilst in health, divorces thrice one of his two wives, without particularising the one divorced, and then dies before he could explain himself (to which wife the divorce applied), it is obligatory on each of them to observe the *Iddut* of death, so that three menses must also be completed within that *Iddut*.

2863. (1963.) So also if the husband says to his two wives, "One of you two is divorced thrice," and afterwards, when he is in a state of sickness (*murz*), he explains which of the two he had divorced, and dies before the expiry of the *Iddut* of the wife divorced; it is obligatory on her to observe her *Iddut* for a period of four months and ten days, so that three menses must also be completed. (See paragraph 1960.)

2864. (1964.) Two *Idduts* can conjointly expire within one and the same period, according to us (*i.e.*, Aboo Haneefa, Mahomed and Aboo Yusoof), whether the two *Idduts* are of the same kind (*e.g.*, when,

for instance both are to be reckoned with reference to menses), or are of different kinds (*e.g.*, when one *Iddut* is to be reckoned with reference to menses, and the other with reference to months) : an example of the first (*i.e.*, where both *Idduts* are of the same kind) is this :—When a divorced woman (whose *Iddut* is three menses) has got one menses (and two more remain for her to complete) and she then marries another husband (which she ought not to do, because she should wait for the expiry of the full term of her *Iddut*, and the marriage on account of this defect is invalid or *Fasid*) who has sexual intercourse with her, and then separation is effected between them (and the *Iddut* consequent on separation in a *Fasid* marriage is three menses) and then after such separation she gets two menses; it is competent to the second husband now to marry her (lawfully), in consequence of the expiry of the *Iddut* regarding the first husband (here there is *Tudakhool* or merger in regard to two menses); but it is not competent to a different man (or stranger) to marry her until she gets three menses from the time of separation, on account of the *Iddut* for the second husband being still due in regard to a different man. (Here both *Idduts* are of the same class, being with reference to menses; the *Iddut* from the first husband is three menses, and that from the second husband is also three menses; one of the menses due on account of the *Iddut* of the first husband had already expired when the second marriage took place; and after the separation by reason of the invalidity of the second marriage, two more menses remained to complete the first *Iddut*, and after those two menses the first *Iddut* became complete: but by this time two menses due to the *Iddut* of the second marriage have also elapsed and have become merged or made *Tudakhool* in those two menses; and these two menses shall be considered as part of both the *Idduts*; so that the result is, that after one more menses, the woman becomes absolutely free to marry any man: and after the expiry of three menses from the divorce by the first husband, the whole of the *Iddut* from that husband expired and two menses out of the three due to the second husband also expired, and at this time, the second husband could marry her, because she had completed the *Iddut* due to the first husband and was within that due to the second husband; but the man on whose account a woman is observing the *Iddut* can always marry her within that *Iddut*, and therefore he, the second husband, could marry the woman before the expiry of one more menses, but a stranger could not marry her unless one more menses expires).

But if the divorce given by the first husband was reversible (in the case mentioned above), it is competent to the first husband to make *Rajaat*, or to revoke the divorce, before she gets the two menses after the second husband separates from her, because at such time, the woman is still in her *Iddut* (from the first husband), but he shall not have sexual intercourse with her until the expiry of the *Iddut* due to the second husband. (Here also there is a merger or *Tudakhool* in regard to two menses).

But if the wife gets all three menses after the separation from the second husband (that is, if the woman immediately after being divorced by the first husband marries a second husband before she has menses, and he also separates from her, and the woman then gets three menses) then both the *Idduts* shall expire at one and the same time.

And the illustration of the second class (that is, where two *Idduts* of different kinds expire at the same time) is this :—a woman's husband dies ; then another man has sexual intercourse with her from doubt, both the *Idduts* shall expire (as follows, *viz.*), the first *Iddut* shall expire after four months and ten days, and the second *Iddut* shall expire with three menses which the woman has (if at all) seen (or gets) in those months (that is, if she gets three menses within that period, the second *Iddut* shall also expire).

ALTERATION OF IDDUT.

Section II.

ON THE TRANSFER OF IDDUT, (THAT IS, THE ALTERATION OF IDDUT OF ONE KIND TO ANOTHER).

2865. (1965.) When an infant wife, divorced by her husband, is observing her *Iddut* (which is to be reckoned by months), and she attains her puberty (that is, she gets her menses) in the midst of her *Iddut*, she shall recommence her *Iddut*, and observe the same for three menses, whether she was irreversibly or reversibly divorced.

2866. (1966.) So also in the case of an *Ayasa* (who has attained the age when the menses cease) if she is observing her *Iddut*, (which is to be reckoned by months, and which consists of three months), and if some of the months have expired, and if she then gets her menses or becomes pregnant (*e.g.*, where the *Talak* is *bain*, and she being a *Mubtoota*, the husband has intercourse with her from doubt), she shall recommence her *Iddut* for the future, so that in the case of the menses

she shall observe *Iddut* for three menses; and in the case of the pregnancy, she shall be in her *Iddut* until she is delivered.

2867. (1967.) And if a divorced woman is observing her *Iddut*, and has finished one or two menses, and then her menses cease, she shall not be relieved of her *Iddut* until she becomes an *Ayasa* (or reaches the age when there is no further hope or likelihood of menses); and when she becomes an *Ayasa*, she shall recommence her *Iddut* for the future, reckoning the *Iddut* by months. See paragraph 1545.

2868. (1968.) And if an *Ayasa* observes her *Iddut*, reckoning the same with reference to months, and completes the *Iddut*, and marries a second husband, and then gets her menses, or gives birth to a child, then, according to those who take the view that a certain age is fixed for an *Ayasa*, and that the blood, which is seen after that age is not menses, the woman's marriage with the second husband shall not be (*Fasid* or) invalid; (because the *Iddut* had expired before the second marriage, according to the rule laid down for the *Iddut* of an *Ayasa* woman): but according to those who take the view that no age is fixed for an *Ayasa*, * , the marriage of the woman with the second husband shall be invalid (because it turns out that it was wrong on her part to reckon her *Iddut* by reference to months, and that she ought to have observed her *Iddut* according to menses).

2869. (1969.) A man divorces his wife, who was the slave girl (of another); the wife then, whilst in her *Iddut*, is emancipated by her master: then if the divorce was reversible, she must complete the *Iddut* prescribed for free women, according to us (that is, Aboo Haneefa, Mahomed and Aboo Yusoof); because her circumstances have improved, that is, (her status has improved in degree) whilst the marriage with her husband was still continuing (in consequence of the *Talak* having been *Rajue*): and in the case of an irreversible (or *bain*) divorce, her *Iddut* shall not be increased by reason of her emancipation. But according to Shafei, on whom be peace, her *Iddut* is not altered in either of the two cases mentioned above.

2870. (1970.) And if the husband of a female slave dies, and she is emancipated during the *Iddut* prescribed on account of husband's death, (which *Iddut* is half of four months and ten days) then her *Iddut*, which consists of two months and five days, shall not be altered, just

as the *Iddut* is not altered by reason of emancipation in the case of an irreversible divorce. See paragraph 1969.

2871. (1971.) And in the case of a free woman, who has been divorced, and whose husband dies during her *Iddut:* if the divorce was reversible, then her *Iddut* shall be altered (from one of divorce) to one of death; but if she was irreversibly divorced, then, if she does not inherit from her husband (that is, if her husband had, in health, divorced her, and the relationship of husband and wife had been completely cut off), then her *Iddut* shall not be altered into one of death; and if she inherits from her husband (thus shewing that she was still his wife at his death) then she shall combine together the months and the menses (that is, she shall observe the *Iddut* both by reference to months and by reference to menses, and shall observe the longer of the two periods. See paragraph 1960).

2872. (1972.) When a woman, whose husband is dead, is delivered of a child more than two years from the date of her husband's death, (thus shewing that the husband could not have procreated the child), then her *Iddut* shall be held to have expired at a time six months and a *little* more before delivery (so as to make the pregnancy referable to another man), and she shall be considered as if she had married another husband after the expiry of the *Iddut*, and had become pregnant by the second husband.

[NOTE.—This case is cited in the Bahur-ool Raik, Volume IV, page 148, in the very words of the text here given, without any reason having been assigned for the rule. The peculiarities of the case are obvious: but the case is possible in the following ways:—Suppose the husband dies, and the wife discovers no signs of pregnancy; then her *Iddut* is four months and ten days; suppose within the four months and ten days she discovers signs of pregnancy, then that discovery shews that the *Iddut* from the beginning ought to have been the *Iddut* of delivery, and the *Iddut* shall be considered to be the period of delivery; and if the delivery takes place within or at two years from the husband's death, the period of delivery shall be the *Iddut*; but if the delivery takes place more than two years after the husband's death, then, inasmuch as the period of gestation does not extend beyond two years, and is not less than six months, it must be held that this delivery was not the period of the *Iddut* of the husband's death, and it must also be held that the

pregnancy, which she declared within the four months and ten days, came to an end at some time afterwards, and that there was a fresh pregnancy referable, no doubt, only by a charitable construction, to a lawful origin; the time when the first pregnancy came to an end not being known of a certainty, you must allow the lowest time for the conception, and make the *Iddut* of the death of the husband expire just before that; the lowest time is a trifle more than six months calculated back from delivery. Other possible ways for the case are also imaginable. The above reasons may be assigned in support of the view taken by Kazee Khan. But it is laid down in the Futh-ool Kadeer in Volume II., page 336,—That the pregnant widow's *Iddut* is the delivery, if the delivery takes place within two years of the death of the husband; but if the delivery takes place more than two years after the husband's death, then it is certain that there was no conception at the death of the husband, and, therefore, her *Iddut* should be counted with reference to months, and not with reference to the time of delivery. This is the rule when the husband is an adult on his death; but if he is a minor and an infant, and the delivery takes place within two years, then Aboo Haneefa and Mahomed hold that delivery shall be her *Iddut*, because she comes within the rules laid down in the Koran regarding the *Iddut* of the wives, whose husbands die whilst they are pregnant; but Aboo Yusoof says that her *Iddut* shall be taken to be regulated with reference to months. But all the three Imams hold that the child's *nusub* shall not be established in the infant husband, because " * * * * * * * * —in the infant, and, therefore, it is not conceivable that the conception could be from him." In the Moosullum-ool Suboot, page 536, Nuwul Kishore's edition, the following reasoning is set forth in the matter of *nusub*. In the portion of the work devoted to *Kyas* or analogy, *Kyas* of the class called Moorsul is defined, and that is where the reason for the command appears in the command itself, but you cannot take the reason for the purpose of varying the command; as for instance, Kuffara or penitence for making *Zihar*, or comparing one's wife with his mother's back is, according to the Koran, either to emancipate a slave or, if he is unable to do that, then to observe continuous fast for two months or, if he is unable to do that, then the Kuffara is to feed sixty poor persons. The reason of the rule is that the command is *Zajir* or preventive in its effect by causing privations or *mushukkut* to the individual who would be deterred, in future, by these very privations from acting similarly: but the *mushukkut* or privations must not be taken to justify an individual, who has

the ability to emancipate a slave, instead of emancipating a slave, to prefer to fast for two months: therefore although *Kyas* requires that *mushukkut* being found in both the courses of action pointed out, either of them could be adopted at the will of the individual, but the Nuss-i-Koran avoids and prevents that analogical reasoning. So also the reason or *illut* for the establishment of *nusub* of a child in a man is that the child is really or *Hukeekutun* born of * * * * the man: this reason requires that the man, who causes the conception of a child in a woman, although she might be in the *firash* of another, should have the *nusub* of the child established in him, but Nuss or express text have avoided this reason; because the prophet of God has said الولد للفراش و للعاهر الحجر, that is, "the child is for the *Firash*" or, in other words, follows the bed, "and that for the *Zanee*, or adulterer, there is prevention of *nusub*:" Aboo Haneefa has, therefore, held that the child born of a woman in the east, the husband being in the west, shall belong to the husband, and shall not belong to the man under whom the woman is; because the woman is not his *firash*; on the other hand, he is the *Ahir* or *Zanee*. Then—See Futh-ool Kadeer, Volume II, page 335, and page 336, line 14,—in the case of an infant husband, the *nusub* of the child shall not be established in such a husband whether the woman gives birth within or beyond two years of her husband's death; because an infant has * * * * and, therefore, it is impossible to imagine that he could cause conception; and when you assume that by Kuramut or otherwise the infant could cause conception, then you admit that the infant is not an infant, and Kuramut cannot be assumed for the purpose of nullifying the ordinances of the *Shera*, which declare, for instance, that a boy before twelve years is an infant, not having the capacity * * * * * whereas in the case of a *Mujboob* it is possible to conceive that * * * *].

2873. (1973.) An *Oomm-i-wulud's* master dies whilst she is in the marriage of another man: it is not obligatory on her to observe the *Iddut* for the master's death; and if her husband divorces her after her master's death (when she becomes free by reason of her status as an *Oomm-i-wulud*), she shall be obliged to observe the *Iddut* (of divorce) prescribed for free women.

2874. (1974.) And if the master, who has given his *Oomm-i-wulud* in marriage to a man, emancipates her whilst she is in her *Iddut* on

account of a reversible divorce, then the woman's *Iddut* (on account of the said divorce) shall be altered (into one prescribed for a free woman, because she gets her freedom before the marriage relation is completely at an end); but if the divorce was irreversible (or *bain*), then the *Iddut* shall not be altered (because she receives her freedom after the relationship completely comes to an end).

2875. (1975.) But if the *Iddut* consequent on her (the said *Oomm-i-wulud's)* divorce (whether *Rujue* or *Bain*) expires (and by reason of the expiry of the *Iddut,* she becomes lawful to her master), and then her master dies, (and his death makes her free, she being his *Oomm-i-wulud*), it is obligatory on her to observe the *Iddut* of her master for three menses (because after the divorce, she again became lawful to her master, who might have had connexion with her, and she must, therefore, observe the *Iddut*). And Shafei, on whom be peace, says, that such *Iddut* consists of one menses (because a single menses is sufficient to show absence of pregnancy). But if she does not get her menses, then her *Iddut* for her master's death is three months (without any difference of opinion). And if she is pregnant, then the *Iddut* for her master's death is the time of her delivery.

2876. (1976.) And if the said *Oomm-i-wulud* (as in 1975) kisses with desire her master's son (by which she becomes unlawful to her master, and this unlawfulness renders it necessary for her to observe *Iddut*, and such *Iddut* would, if the master continues to live, be that of a female slave), then in case the master dies (after the unlawfulness has arisen) the same rule holds good (as regards her *Iddut* as in 1975).

2877. (1977.) And if the *Oomm-i-wulud's* husband and master both die, so that the space of time between their deaths is less than two months and five days, and it cannot be ascertained which of the two died first, she shall observe her *Iddut* (as a matter of precaution) for four months and ten days (because if the master died first, the woman would become free, and her *Iddut* would be four months and ten days on account of her husband's death); and if between their deaths the intervening space of time is two months and five days, or more (and it does not appear who died first), then she shall observe her *Iddut* for four months and ten days and three menses (because if the husband dies first, the wife's *Iddut* would be that of a female slave, *viz.*, two months and five days, and the master having died more than two months and five days after her husband's

death, she had become lawful to her master after the expiry of her *Iddut* of two months and five days; and having become lawful to the master, she must observe the *Iddut* after her master's death; and she having become a free woman by her master's death, the *Iddut* is three menses. If the master dies first, then the *Oomm-i-wulud* becomes a free woman: and the husband's subsequent death would bring on the wife the liability to observe *Iddut* for four months and ten days. If it cannot be ascertained who died earlier, the longer of the two *Idduts* shall be taken, and that is four months and ten days plus three menses).

And if the time that intervened between their deaths cannot at all be ascertained, then the *Iddut* of death and three menses shall be added together according to the view taken by Aboo Yusoof and Mahomed, on whom be peace; but Aboo Haneefa, on whom be peace, says, that she shall observe her *Iddut* for four months and ten days, and there is no condition of menses in this *Iddut* (that is, in addition to four months and ten days, it is not necessary for her to observe *Iddut* for three menses also).

And if there has been a reversible divorce, and the master then dies, then also the above rule holds good, and the woman shall not inherit to her husband (because the case is that the husband of an *Oomm-i-wulud* has divorced her reversibly, and then after the divorce the master dies; the husband also dies after the divorce, but who died first cannot be ascertained: what shall be the rule in this case as regards inheritance? If the husband had died first, the wife would have still been a slave, and the *Iddut* for the husband's death would have been two months and five days, and she would have been bound to observe this *Iddut*, the divorce being *Rujue*, and she would have certainly not inherited to the husband, she being a slave girl: if the master had died first, then his death would have made her free, and her *Iddut* on her husband's death after a *Rujue* divorce would have been the *Iddut* obligatory on a free woman for her husband's death, and that *Iddut* is four months and ten days, and she would have inherited to her husband to a certainty having been a free woman at her husband's death. Therefore, when it cannot be known whether the master or the husband died first, then there arises a doubt as to what sort of *Iddut* she shall have to observe—whether that of a *Hoora* (*i.e.*, a free woman) or that of a female slave; and therefore the *Iddut* shall be the longer period so as to make it certain that the *Iddut* has expired; and then arises a doubt whether she shall inherit to her husband or not; but

inasmuch as inheritance is not established when there is a doubt, the woman shall not inherit).

2878. (1978.) And sometimes four *Idduts* become obligatory on a woman; that is, when the husband pronounces a reversible divorce on his infant wife, who is the female slave of somebody else: she must (I) observe her *Iddut* for a month and a half (because she not being capable of menses and being a slave, her *Iddut* is half of that of a free woman who does not get menses, and whose *Iddut* is three months; if the female slave gets her menses her *Iddut* would be two menses); and if she attains her puberty (and gets her menses), during the *Iddut*, then her *Iddut* (arising from the same cause, *viz.*, the reversible divorce) shall be altered (from one month and a half) to two menses (this is *Iddut* No. II); then if her master emancipates her during the *Iddut*, then her *Iddut* (arising from the same cause, *viz.*, the aforesaid reversible divorce) shall become three menses (this is, *Iddut* No. III); and if the husband, who has divorced her, dies during the *Iddut*, then her *Iddut* shall be altered into a period of four months and ten days (this is *Iddut* No. IV).

2879. (1979.) When a *Kitabya* woman is the wife of a Moslem, her *Iddut* is like the *Iddut* of a Moslem woman in case of divorce by the husband or his death; that is to say, the free *Kitabya* woman is like the free Moslem woman; and the *Kitabya* slave woman is like the Moslem slave woman.

But if the *Kitabya* woman is the wife of a *Zimmee*, then there is no *Iddut* obligatory on her in the event of the death of her husband or *Firak* (that is, separation) from him, according to the view of Aboo Haneefa on whom be peace, except when she is pregnant, in which case she shall be prevented (or kept back) from her (new) husband (if she has married anybody) until she is delivered; and Aboo Yusoof and Mahomed, on whom be peace, say, that she is obliged to observed *Iddut*.

2880. (1980.) And a woman (originally an infidel) who leaves (or makes *Hijrut* from) the *Dar-ool Hurub* (as a Moslem, leaving her husband behind as an infidel—that is, the woman is a *Moohajera*), shall not be obliged to observe *Iddut*.

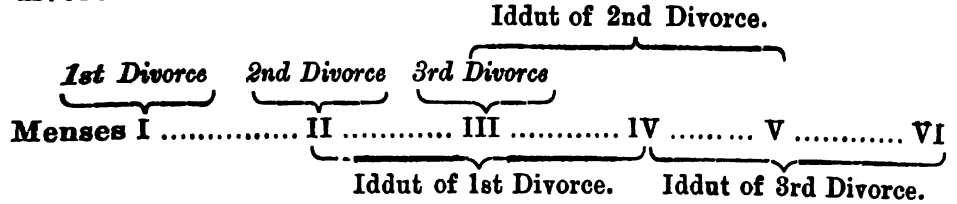
2881. (1981.) A man admits that he divorced his wife five years ago; then if the woman falsifies him as regards the time stated by the husband, or says, "I do not know (when he divorced me);" she shall be obliged to observe the *Iddut* from the time of the husband's admission

(because the divorce shall be considered as having been given on the date of the admission); and the woman shall be entitled to maintenance and residence; but if the woman confirms the husband's statement regarding the time, then it is stated in the Asul, that it is obligatory on her to observe the *Iddut* from the time of the divorce (that is, she shall reckon the *Iddut* from the time the divorce is alleged to have been given; and if the *Iddut* has expired, she can marry at once; if not, she must complete what remains to be completed); and in the Fatwa it is laid down that she must observe the *Iddut* from the time of the admission (by the husband); and (therefore according to the Fatwa) the effect of confirmation by the woman of her husband's statement does not appear except in avoiding the right of maintenance (that is, when the woman confirms the husband's statement regarding the time of the divorce, then she shall observe *Iddut* from the time of the husband's admission, but she shall not get maintenance; but if she falsifies him, she shall observe *Iddut* from the time of the admission, and she shall get maintenance).

2882. (1982.) When a free woman, who has been divorced, admits that her *Iddut*, reckoned with reference to menses, has expired, she shall not be confirmed in her statement, unless two months have expired from the date of divorce (because it is possible for three menses to expire in two months): and this view is correct.

2883. (1983.) When a woman receives intelligence of the fact that her absent husband has divorced her, or of the fact of the absent husband's death, her *Iddut* shall be considered from the time of the death and the divorce according to us (that is, Aboo Haneefa, Mahomed and Aboo Yusoof), and not from the time of the intelligence.

2884. (1984.) A man says to his wife, with whom he has had intercourse, "*Koolluma*, or as often as thou shalt get menses and become pure, thou art divorced;" and she gets three menses (and the effect is that three divorces shall be caused): her *Iddut* shall commence from the first divorce.



2885. (1985.) When the wife of an absent husband receives intelligence of his death from one man, and intelligence of his being alive from

two men, then, if the man who informs her of his death, gives testimony that he saw the husband's death or his funeral, and if he is a just man, it is competent to the woman to observe *Iddut*, and to marry; this is when the two men (who bring intelligence of the husband being alive) do not state the date (when they last saw him alive); but if they state the date, and the date when they saw the husband alive is after (the date when the other man says he saw his death or funeral), then their testimony is preferable.

2886. (1986.) A man marries a woman and has sexual intercourse with her; he then says, "I made an oath in the past that, 'if I ever marry a Syeeba, she is thrice divorced,' but I did not know that the woman was a Syeeba:" divorce shall be caused by his admission; then if the woman confirms him (in the fact that she is a Syeeba), she shall be entitled to half of the dower by reason of the divorce (which occurred as a consequence of the condition) before sexual intercourse, and she shall also be entitled to her proper dower on account of sexual intercourse (from doubt arising from the circumstance that he believed her to be his wife whereas she was not on account of the divorce having taken place), and she shall be obliged to observe *Iddut* on account of such sexual intercourse, but she shall not be entitled to maintenance, because the woman has (by her statement in effect) confirmed the husband as regards the occurrence of the divorce before sexual intercourse (because there is no *Iddut* here from divorce, inasmuch as the woman was *ghyr mudkhool biha*, that is to say, one with whom there was no sexual intercourse before the time of the divorce, and, therefore, there is no right to maintenance); but if the woman falsifies the husband in his oath (that is, she says, "your oath has not resulted in my divorce, because I was not a Syeeba"), then she is entitled to one dower, and she shall be entitled to maintenance; because the woman says that the divorce was (only) caused upon her by the admission (or allegation) of the husband after sexual intercourse (that is, she says, "there is no valid divorce because I was not a Syeeba, but the divorce has only been caused by the husband's admission or declaration made after intercourse," and, therefore, the divorce takes effect after sexual intercourse, in which case the dower becomes payable, and there is a right to maintenance).

2887. (1987.) A man divorces his wife thrice, and when she has observed her *Iddut* for two menses, he has sexual intercourse with her by compulsion; then if the husband has sexual intercourse whilst denying having divorced her, it is obligatory on her to observe a full *Iddut* to be

commenced afresh (because she knew for certain that he had divorced her thrice, and therefore there is one *Iddut* of divorce; and the husband having forgotten the divorce, has intercourse with her, and this intercourse is from doubt, and, therefore, there is another *Iddut* obligatory by reason of intercourse from doubt: there was *Tudakhool* in one menses); and if he admits the divorce and (still) has sexual intercourse with her by way of *Zina*, then she shall not observe an *Iddut* in full in the future (that is, a fresh *Iddut* shall not be observed; because there is no *Iddut* for *Zina*).

2888. (1988.) So also if a man gives his wife an irreversible (*bain*) divorce, or gives her three divorces, and then remains with her for a time; then if he so remains, whilst denying the divorce (and the woman has no proof of divorce), her *Iddut* shall not expire (whilst he remains with her); but if he so remains with her, whilst admitting the divorce, then her *Iddut* shall expire (with the expiry of three menses).

2889. (1989.) A man divorces his wife thrice, and conceals the fact from the people, and when the woman has had two menses, he has sexual intercourse with her, and she becomes pregnant, and he then admits having divorced her, she shall be entitled to maintenance until she is delivered; (because after the divorce, although it was concealed, three menses would have put an end to her *Iddut*, but the intercourse took place within that time, and, therefore, the intercourse was from doubt which created the obligation of *Iddut*, and the conception extends that *Iddut* up to the time of the delivery).

2890. (1990.) A man divorces his wife thrice, and then she marries another man at once, and the second husband has sexual intercourse with her, and then separation is effected between the woman and the second husband (the marriage being invalid as having taken place within the *Iddut*): the woman shall be bound to observe her *Iddut* for three menses on account of both the husbands (and there shall be *Tudakhool* or merger in all the three menses) but her maintenance and residence shall be on the first husband.

Contrary to the case of a woman (who is) in a subsisting marriage (that is, who is not divorced by her husband), who marries another man, and the second husband has sexual intercourse with her, and then separation is caused between her and the second husband; in this case the first husband shall not be bound to maintain her as long as she is in

her *Iddut* (from the second husband, whose marriage with her was void but there is liability to *Iddut* on account of *shoobah-i-Akd*, which rendered the intercourse as one from doubt); because when she gave herself in marriage to the second husband, and the liability to *Iddut* from the second husband became obligatory on her, she became (as regards the first husband) rebellious (*Nashiza*); and, therefore, she is not entitled to maintenance (from the first husband).

But as regards the woman (as in the first case) who became completely separated (*mubtoota*), it is not her act in giving herself in marriage during the *Iddut* that prevented the husband from having access to her, but the triple divorce already given by the husband prevented such access before she married the second husband; (so that, even if she had not married, she would not have been in a position to receive him).

2891. (1991.) A man marries a woman by way of an invalid (*Fasid*) marriage, and has sexual intercourse with her, and separation is caused between them: she shall be obliged to observe *Iddut* for three menses from the time of the separation.

2892. (1992.) A female minor attains her puberty; (the rule for a girl attaining puberty is when she gets menses or when she has emission or *Ihtilam* or when she conceives): she then sees blood for one day, and the blood then ceases, so that one year expires (the rule being that blood, to constitute menses, must appear or be seen for three days, but if less, then it is not the blood of the menses, but is due to sickness); her husband then divorces her: she shall observe *Iddut* for three months; because if blood does not continue for three days, it does not amount to menses, and the woman, therefore, continues to belong to that class of women who reckon their *Iddut* by reference to months.

[NOTE.—See Fath-ool Kudeer, Volume II, page 349, and Rudd-ool Moohtar, Volume II, page 1026. If a man gives a *Rujue* or reversible divorce to his wife, and she gives birth to a child within two years from divorce, not having, in the interval, made any admission that her *Iddut* had expired; then the *nusub* of the child shall be established in the husband, and he shall not be held to have made *Rujaat* or revoked the divorce; because the conception is referable to a time before divorce. If she gives birth to a child in more than two years or in twenty years from the time of

the divorce, without having made any admission in the meanwhile that her *Iddut* had expired, even then the *nusub* of the child shall be established in the husband, and it shall be held that she is a *Moomtuddut-ool-Toohur* (or a woman, who has long intervals of menstruation); because the lowest period of purity or freedom from menses is fifteen days, and there is no limit to the longest period of such purity, so that the longest period might be ten years or more: and it shall be held that she gets her menses at very long intervals, and that her *Iddut*, which consisted of three menses, was very long in duration, and that her husband had intercourse with her in one of such intervals during the *Iddut*, and that the child was conceived at a time which was between six months and two years, calculated back from the date of the birth; and that the husband having had intercourse after a reversible divorce during the period of *Iddut*, he has revoked the divorce. This shews that when the period of *Iddut* is counted with reference to menses, there is no limit to that period, and the period might expire in two or three months, or more: it may take ten or twenty years to expire. If she were to get her menses once, and were not to get it afterwards for some time, it does not follow that she would have to reckon her period of *Iddut* with reference to months, and not with reference to menses; on the other hand, her *Iddut* must be with reference to menses as long as she does not reach the age of *Ayas*, which is fifty-five years].

2893. (1993.) A man divorces his wife, and then compromises with her for something on account of her maintenance during the period of the *Iddut;* then if her *Iddut* is to be reckoned with reference to months, the compromise shall be valid; because (in that case) the time of the *Iddut* is known. But if her *Iddut* is with reference to menses, then the compromise shall not be valid; because the period is not known: and it is not possible to render (or to construe) the compromise as a release on behalf of the woman in regard to some portion of her maintenance; because release from (even the whole of the) maintenance after divorce is not valid, just as it is not valid whilst the marriage lasts.

2894. (1994.) And if a (divorced) woman compromises, after having become (*bain* or) completely separated from her husband, for something in lieu of the hire for suckling the child, then the compromise is valid.

2895. (1995.) And if a (divorced) woman compromises with her husband, in lieu of her residence, for dirhems (or for anything else), the

compromise shall not be valid (that is, such a compromise is not at all valid, residence being the right of God).

God knows best.

SECTION III.

ON WHAT IS FORBIDDEN (OR UNLAWFUL) TO THE (MOTUDDA OR) WOMAN WHO IS OBSERVING HER IDDUT.

2896. (1996.) A free Moslem woman, observing her *Iddut* of divorce or of separation, but not of death, shall not go out of her house in the night or day, except, when necessary, on account of fear of the house tumbling down or catching fire, or of danger to property.

2897. (1997.) And a woman, who is observing her *Iddut* on account of her husband's death, shall go out of the house at day time for her necessities connected with maintenance (because she must earn her own maintenance in this case, but in the case in 1996, the maintenance is generally obligatory on the husband).

2898. (1998.) And she (that is, the woman who is observing her *Iddut* on account of her husband's death), shall not pass her night except in the room of her husband (that is, in the room assigned to her by her husband). And it is reported from Mahomed, on whom be peace, that it is competent to her to pass her night (or time) in a room different from that of her husband for less than half the night (that is, in an adjoining room or a room close by, for the sake of company). And what is considered proper in this matter (that is, in the matter of the room where she must pass her night and complete her *Iddut*) is the place where she used to reside before separation.

2899. (1999.) But as regards a woman, whose husband is dead, if the share she receives by inheritance in her husband's house, is sufficient for her, then she shall reside in that share; and if amongst the husband's heirs, there is one who is not (*Maharim* or) unlawful to her (as regards marriage), then, if it is possible for her to seclude herself from him, or to put up a screen between her and that heir, then she shall reside in her share; but if her share is not sufficient, then it shall be competent to her to go out of the house for such necessity (that is to say, to go out and seek for another residence): so also if she entertains fear about

her (*Muta* or) furniture (and property) in her husband's house, which she has received as her share. But she shall not afterwards go out of the house to which she may have removed.

2900. (2000.) And if the husband divorces his wife whilst she is living with him in a tent, and the husband goes about from place to place for grass and water, then, if there is no clear harm to himself or to his property, he shall leave her (during his temporary absence) in that place that is, in that tent); and it shall not be competent to him (in that case) to take her along with him, and it shall not be competent to her to remove from that place (that is, from that tent). But if he apprehends clear (positive) harm to himself or to his property by his leaving her in that place (or tent), then it shall be competent to him to remove her (and take her with him) on account of such necessity.

2901. (2001.) When a woman is observing her *Iddut* (on account of her husband's death) in a house in which there is nobody with her, and she has no fear of thieves or neighbours, but she is afraid on account of death having taken place (that is, superstitious fear); then, if the fear is not very intense, it shall not be competent to her to remove from that place; because (only) slight fear is equivalent to a feeling of loneliness (*wuhshut*); but if the fear is intense, it shall be competent to her to remove from that place; because if she were not to remove (notwithstanding this), there might be danger of her losing her understanding or the like.

2902. (2002.) A woman obtains *Khoola* from her husband in consideration of the maintenance for the period of her *Iddut*, and she is under the necessity of earning her maintenance: the learned lawyers have entered into a discussion in this matter; some of them have held that it shall be competent to her to go out of the house like a woman whose husband is dead (and who must earn her own maintenance); whilst others have held that it shall not be competent to her to do so; and this view is the approved one, because she has, of her own accord, rendered her right void (by giving up her right to maintenance for the purpose of obtaining the *Khoola*); and it shall not, therefore, be competent to her to advance the same (that is, the necessity for earning her maintenance) as an excuse.

2903. (2003.) A woman, who is observing her *Iddut* shall not undertake a journey for the purpose of making a pilgrimage, or for any other purpose; and her husband shall not take her on his journey according to us (that is, Aboo Haneefa, Mahomed and Aboo Yusoof); but

Zoofur, on whom be peace, says, that in case of a reversible divorce, it shall be competent to the husband to take her with him on his journey.

2904. (2004.) But if the husband takes her (*i.e.*, a wife divorced reversibly) along with him on his journey, without intending revocation of the divorce, then the husband shall not be held to have revoked the divorce (by the mere fact of his having taken her along with him on his journey). But if he takes her along with him on his journey, having cited witnesses to his revocation of the divorce, it shall be competent to him to take her along with him on his journey (because he has revoked the divorce; and a man intending to revoke the divorce should conform to this course; because otherwise there is no presumption of revocation from the mere fact of his having taken the wife with him on his journey).

2905. (2005.) And if the husband takes his wife along with him on his journey before divorcing her, and then (whilst in the journey) he divorces her irreversibly (*bain*), or dies leaving her surviving, then, if the distance between the house where she lived (and from where she started on the journey) and the place in the journey where the death or divorce took place, is less than the time (technically) prescribed as the period of journey (that is, three days), she shall return to her house: and if the distance to the house where she lived is equal to the time of the (technical) journey, but the distance to the destination is less than the distance prescribed (technically) for a journey, then she shall proceed on her journey; but if towards each of them (that is, towards her house as well as towards the destination), the distance is that of a journey (technically known as such), and the event (that is, the death or divorce) has taken place in the open plain (*Mufazat, i.e.*, where there is no habitation), then she shall proceed to the nearest house of protection; but if (at the time of the event) she is in a protected place (instead of being in a plain) she shall stay at that place according to Aboo Haneefa, on whom be peace; but the two disciples of Aboo Haneefa have said that if the woman finds a man who is (her *Maharim* or) unlawful to her (for marriage), she shall go out with him, to whichever of the two places she likes (whether to her own house or to the destination, both being equally distant).

But if the divorce was reversible, she shall not separate from her husband in any case (whether the divorce has taken place in the open plain or in an inhabited place, and whatever be the distance to her own house or to the destination.)

2906. (2006.) And it is allowable to a woman, who is observing her *Iddut*, to go out as far as the court-yard (*sahan*) of the house; and if the house consists of several rooms, each of which is occupied by persons (who are not unlawful to the woman for the purpose of marriage) then she shall not go out as far as the court-yard.

2907. (2007.) And if the room, in which the woman, who is observing her *Iddut* lives, is taken by her on hire, the hire shall be payable by the husband. And if the husband is absent, and the owner of the house demands the rent from her, she is bound to pay the rent and live there; and if she is not able to pay the rent, it shall be competent to her to remove to another house: so also shall it be competent to her to remove if the owner of the house ejects her.

2908. (2008.) And if the woman, who is observing her *Iddut*, is a minor, it is lawful for her to go out of the house, unless the divorce is reversible, when she cannot go out of the house except with her husband's permission.

2909. (2009.) And a *Kitabya* woman is in the same position as a female minor in this matter (*i.e.*, in the matter of going out of the house).

2910. (2010.) And if the woman, who is observing her *Iddut*, is (a *Mumlooka* or) owned-property, being a *kin* (*i.e.*, a mere slave without any right whatever), or a *Mookatuba* or an *Oomm-i-wulud*, it shall be competent to her to go out of the house if her master has not assigned her a fixed room (*Tubweeah*). And if the master has assigned her a fixed room, she shall not go out of the house, except when the master turns her out.

2911. (2011.) And a woman, who is observing her *Iddut* (after *bain* divorce, or after her husband's death), shall (if she is grown up, and of age) avoid all ornamentation (to set off the charms of her person); such for instance as the use of antimony (or collyrium), the use of *henna* and (the practice of) illuminating the face (*Khizab*), the use of oil or the putting on of ornaments, using scent, wearing scented cloth, and cloth colored with saffron, and cloth colored red, except when the cloth is so colored that if washed the color suffers no deterioration, and the wearing of Kusb cloth (a fine linen cloth made in Egypt). And it is reported from Aboo Yusoof, on whom be peace, that there is no fear if she wears silk and Kusb.

And if the woman is observing her *Iddut* on account of reversible

divorce, it shall not be obligatory on her to go into mourning (or observe *Hidad*).

The prohibition against the use of antimony is when the antimony is used for the purpose of ornamentation; but when she uses antimony not for the purpose of ornamentation (but for its medicinal virtue), it is allowable to her to do so. So also if she wears silks or uses oil on account of pain, and not with the object of ornamentation, it is allowable to her to do so.

2912. (2012.) And if she (that is, the woman, who is observing her *Iddut*) combs her hair, then the learned lawyers have held that if she uses that part of the comb where the teeth of the comb are more wide apart, there is no harm in her using the comb; but what is abominable for her is to use the other side of the comb, because such side of the comb is used with the object of adornment.

2913. (2013.) And so if she (that is, the woman, who is observing her *Iddut*), has only one suit of clothes, it is lawful for her to use the same, although the same may be colored.

2914. (2014.) And if a man marries a female slave (belonging to another) and if after having intercourse with her, he becomes her owner, and she gives birth (to a child) from him, the marriage between them shall become (cancelled or) invalid (*Fasid*), it is not obligatory on her to (abstain from decorating her person or) observe mourning (*Hidad*). And if the husband (now her master) is desirous of giving her in marriage to another person, it shall not be lawful for him to do so, until she gets two menses (from the time of purchase when the marriage became unlawful). And if he emancipates her (after purchasing her), it is obligatory on her to observe two *Idduts*, one *Iddut* resulting from the (cancellation or) invalidity (or *Fusad*) of the marriage, (in which the *Iddut* consists of two menses, see paragraph 1955), which carries with it the liability (to abstain from decorating her person or) observe mourning (*Hidad*); and the other *Iddut* is the *Iddut* of emancipation, which does not involve (the necessity for) *Hidad* (and the period of this *Iddut* is three menses, see paragraph 1953); she will thus observe mourning (*Hidad*) for two menses (in which both sorts of *Iddut* combine and run on, so that there is *Tudakhool* or *merger* between them in regard to the two menses relating to the two *Idduts*) and not in the third menses. And if the husband (now master) emancipates her after the woman has had two menses (by which

the *Iddut* of the cancellation of the marriage becomes completed) after the marriage had (been dissolved or) become (*Fasid* or) invalid (on account of the purchase as aforesaid), it is obligatory on her to observe her *Iddut* for three menses (because her status now becomes changed and she becomes a free woman, and a slave when she becomes a free woman shall observe *Iddut* for three menses) and there is no obligation to observe *Hidad* in this case.

2915. (2015.) And a woman, who is observing her *Iddut* from an invalid (or *Fasid*) marriage, is entitled to go out of the house, and there is no liability of mourning on her (because there was no *naimut-i-nikah* or blessings of marriage which she could have lost, and for which she might express mourning) just as it is not obligatory on her to observe the *Iddut* of death (because she is really no wife).

2916. (2016.) And a *Kitabya* woman is not obliged to observe mourning.

God knows best.

Section IV.

ON THE MOTUDDA (OR A WOMAN OBSERVING HER IDDUT) WHO INHERITS.

2917. (2017.) A man gives reversible divorce to his wife, and then dies whilst the woman is observing her *Iddut* (from such divorce) : she shall inherit, whether the divorce was given whilst the husband was in health or in sickness: so also if the woman dies whilst she is observing her *Iddut* (in a reversible divorce), the husband shall inherit to her.

2918. (2018.) And if the husband irreversibly divorces his wife whilst he is in health, and then becomes sick and dies whilst the woman is observing her *Iddut* (from such divorce), the woman shall not inherit to her husband (because having divorced her whilst he was in health, his divorce was *bonâ fide*, and he was not actuated by any motive to deprive her of her right of inheritance); but if he divorces her irreversibly whilst he is sick (*i.e.*, in *Murz*) ; then, if the divorce was given by him at the woman's request, she shall also not inherit (because the woman herself acted to the detriment of her future right of inheritance); but if he divorces her irreversibly without a request from her (and this is the case in which the husband is *Farr-bil-Tulak*) and after the divorce the husband dies whilst the woman is observing her *Iddut* from such divorce, then the woman shall inherit to her husband according to us (Aboo Haneefa, Mahomed and Aboo Yusoof) ;

but if the husband dies (not whilst the woman is observing her *Iddut*, but) after the expiry of the *Iddut*, then the woman is not entitled to inherit to her husband: but Malik and Ibn-i-Aboo Layla, on whom be peace, say, that the woman shall be entitled to the inheritance (even if the husband dies after the expiry of the *Iddut*).

2919. (2019.) And the principle in this matter is that when one of the spouses chooses to get separated after the accrual of the right of the other to his (or her) property (and such right of the heir arises at the time of the *Murz-ool-mout* of the owner), then the other person shall inherit to the first-mentioned. And the right of the other to the property of the first-mentioned person, accrues only when one of the spouses (*i.e.*, the owner of the property) is reduced to a condition when destruction (*i.e.*, death) is (more) probable from his condition (than his survival) by reason of sickness or other cause, (*e.g.*, when a man is being taken for *Kisas*) : and the right of the other person does not appertain when the first person is only sick (without being reduced to such a condition as aforesaid), because no man is free from sickness, and every disease does not lead to destruction.

2920. (2020.) And it is necessary to lay down a rule (for *Murs-ool-mout*) which shall be universal. The learned lawyers have held that if the sick man is a man who has become thin from sickness, so that he becomes bed-ridden and is rendered incapable of maintaining organization in (or managing) outside affairs, and his sickness is every day increasing, then the right of the other party (that is, the wife) accrues to (or comes to be connected with) his property; because the probability from his condition is dissolution; and then if such a man, in such a condition, divorces his wife, he is said to be a *Farr* (*i.e.*, literally one who is running away, that is, a run-away with his estate, or one who is trying to prevent his wife from inheriting to him).

And if a woman is sick, then some of the learned lawyers have said that if she is not able to say her prayers standing, and is unable to go to the privy (or *mukhruj*) without assistance, she is held to be bed-ridden (*Saheb-i-Firash*). And regard is to be had in her case to inability to manage inside (or internal domestic) affairs; and in the case of a man, regard is to be had to incapacity to manage outside affairs.

But a person who is able to go about to meet his wants, but gets fever every day, is like a man in health. But a person who is decrepid (*Mook'ad* or cripple) and one who is suffering from paralysis, whose complaint does

not go on increasing every day, is like one in health. So also one who is wounded or is suffering from pain, but who is not by such wound or pain rendered bed-ridden, is like one in health.

2921. (2021.) And if a man, who is bed-ridden, divorces his wife, and is afterwards killed, or dies during that sickness from a cause other than that sickness from which he was suffering, that man shall be held to be a *Farr*.

2922. (2022.) And if one, who is arrayed in rank against an enemy for battle, divorces his wife, he is not to be held a *Farr;* but if he advances from his rank to (*biraz* or) engage with the enemy in an actual fight, and divorces his wife, he is held to be a *Farr;* but it is reported from Aboo Haneefa, on whom be peace, in the Nawadir, that such a man shall not be held to be a *Farr*.

2923. (2023.) And if he who is imprisoned under a sentence of (*Kisas*) death, or of being stoned to death, divorces his wife, he shall not be considered a *Farr* (because his death is not imminent—mercy might be extended to him); but if he is taken out for the purpose of being put to death, and then divorces his wife, he is held to be a *Farr*.

2924. (2024.) And when a man is riding the ocean, and the ship goes to pieces, and he remains on a plank, and divorces his wife, he is held to be a *Farr;* but if he gives the divorce after the commotion in the ship (caused by a storm) has begun, but before the ship goes to pieces, he is not held to be a *Farr*.

2925. (2025.) And if a man becomes bed-ridden, and divorces his wife, and then recovers, and then again becomes sick and dies, (even) whilst his wife is still observing her *Iddut*, he shall not be held to be a *Farr*.

2926. (2026.) And if a sick man says to his wife, "I divorced thee thrice whilst I was in health," and the woman falsifies him (saying, "You did not divorce me whilst in health,") and the husband then dies whilst the woman is still observing her *Iddut* (that is, *Iddut* of what is to be considered as divorce resulting from the man's own admission of divorce) the woman shall inherit to her husband.

2927. (2027.) And if a sick man gives his wife a complete (*bain*) divorce after he has had sexual intercourse with her, and afterwards says to her, "When I shall marry thee, then thou art thrice divorced,"

and then marries her during the *Iddut*, the woman shall become thrice divorced. And if the husband dies (after the fresh marriage which produced fresh divorces) whilst the wife is still observing her *Iddut*, then the husband's death is held to have taken place in the *Iddut*, which has become obligatory by the operation of the divorces consequent on the second marriage according to Aboo Haneefa and Aboo Yusoof, on whom be peace, (and he shall not be considered a *Farr*, and, therefore, she shall not inherit to her husband), and therefore, the consequence of *Firar* (or intention to deprive the wife of her inheritance by the *bain* divorce pronounced in sickness) involved in the first divorce is rendered void by reason of the subsequent marriage, (which nullified or removed what apparently was his intention in giving a divorce in sickness, *viz.*, to deprive her of her inheritance by thus giving her a divorce in sickness, the subsequent marriage shewed that he had no intention to be a *Farr*; and this marriage removed from him the *wusf* or quality or character of being a *Farr*: the divorces consequent on the second marriage took place after that marriage, and that marriage negatived the intention of *Firar*); although this marriage is such that divorce was caused after it (that is, as a consequence of the marriage); but the marriage took place by her own act, and, therefore, the husband shall not be deemed to be a *Farr*. (That is, the sick man having divorced his wife irreversibly, that divorce involved liability to *Iddut*; and if the husband had died during the *Iddut*, he would have been a *Farr*, and the wife would have inherited to him: but he marries her again during the *Iddut*, and the effect of that was that the existing *Iddut* came to an end by reason of that very marriage, so that the husband no longer remained a *Farr*; and if the marriage itself had not resulted in divorce, and if the husband had died, the wife would have inherited; but the marriage was such that by the husband's previous oath, the marriage itself resulted in three divorces, and the effect of the divorces was that a new *Iddut* commenced as soon as the three divorces were caused—the previous *Iddut* having come to an end by the marriage; then the husband dies, after the first *Iddut* had thus come to an end as aforesaid, although the period embraced by it had not expired, and after the second *Iddut* had commenced; therefore, the divorce of the *Firar* kind was rendered nugatory).

But, according to the view taken by Mahomed, on whom be peace, it is obligatory on her to finish the first *Iddut* (and the marriage does not put an end to the first *Iddut*, because the marriage brings divorces in

its train), and therefore if the first divorce was given whilst the husband was sick, then the woman shall inherit (and the husband shall continue to be a *Farr*) ; and if the first divorce was given in health, she shall not inherit.

[See Volume II, Shuruh Vikaya, pages 68 and 69, and Rudd-ool Moohtar, page 862. *Taleek* or condition in regard to divorce denotes that when the condition is realised, then the husband is supposed to say,—"Thou art divorced." If the husband is in health when he pronounces the formula of conditional divorce, and if the condition is realised whilst he is sick, then the case stands as follows :—If the condition is an act of the husband, whether it is a necessary act, *e.g.*, eating or drinking, or not, the woman shall be heir ; if it is the act of the woman, then if the act is a necessary act, she shall be heir, except according to the view of *Mahomed* and Zoofur ; if the act is the act of the woman, but not a necessary act, then she shall not be heir ; if the condition is not the act of the husband or of the wife, then the woman shall not be heir. When the husband has pronounced the formula of divorce in a state of sickness, and the condition is realised in sickness, then the case stands as follows :—If the condition is the act of the husband whether the act is necessary or not, the woman shall inherit ; if the condition is the act of the wife, and it is a necessary act, then she shall be heir ; if the condition is the act of the wife but the act is not necessary, then she shall not be heir ; if the condition is not the act of the husband or the wife, then she shall be heir. It must be noted that the divorce in all these cases shall be caused, and *Firar* does not interfere with the divorce being caused ; it only, in certain cases, defeats the intention of the husband to deprive the wife of her right of inheritance].

2928. (2028.) When a man becomes an apostate—may God prevent such a calamity—(and his wife remains a Moslem) and he is put to death (as a consequence of his apostacy), or he goes into the *Dar-ool Hurub*, or dies (a natural death) in the *Dar-ool Islam* whilst an apostate, his wife shall inherit to him (the case is so put because a doubt might arise whether she shall so inherit ; for four causes prevent inheritance,—*Rikk* or being a slave ; difference in religion ; difference in country, that is, when the deceased lived in the *Dar-ool Islam* and the heir lives in the *Dar-ool Hurub* or *vice-versâ* ; and murder of the late owner by the heir) : and if the wife becomes an apostate, and then dies or goes to the *Dar-ool Hurub*, then if her apostasy was whilst she was in health, her

husband shall not inherit to her, but if she was at that time sick (and dies of that sickness) then her husband shall inherit to her, reasoning from weak analogy (*Istihsan*): and if both of them at once become apostate, and then either of them becomes a Moslem, and then one of them dies, then, if of the two the Moslem dies, the apostate shall not be an heir; but if the apostate dies, then, if the deceased apostate was the husband, the Moslem woman shall inherit to him, but if the deceased was the wife then, if her apostasy was whilst she was sick, the Moslem husband shall inherit to her (because then her object in becoming an apostate was to deprive her husband of his right), but if her said act was whilst she was in health, then he shall not inherit.

[NOTE.—See Rudd-ool Moohtar, Volume II, page 869. If the wife becomes an apostate, and, before the expiry of the *Iddut*, dies, or goes to the *Dar-ool Hurub*, then, if the apostasy was in sickness, the husband shall be heir by *Istihsan*; because it is clear that the reason of her having become an apostate was to deprive the husband of his right as her heir, and she, therefore, became a *Farr*, although *Kyas* would lead to the conclusion that the husband should not inherit on account of the rule by which difference of religion prohibits rights of mutual inheritance: if the woman becomes an apostate whilst in health, then the husband shall not be an heir; because by the apostasy she became *bain* from her husband, and the consequence of a woman's apostasy not being death but imprisonment, her apostasy is not regarded in the light of sickness. But if the husband becomes an apostate, the consequence of the apostasy is that he shall be put to death, and, therefore, the period between his apostasy and his execution is regarded like *Murz-ool-mout*; therefore the wife shall inherit to the husband whether his apostasy was in health or in sickness; because apostasy is like *Murz-ool-mout*, and the apostasy having resulted in the cancellation or *Fuskh* of the *Nikah*, it is clear that this dissolution of the marriage and the subsequent separation between the parties took place whilst the husband was in *Murz-ool-mout*; and, therefore, the husband became a *Farr*. If both the husband and the wife become apostate at one and the same time, their *Nikah* does not become dissolved; if, therefore, the woman returns to Islam, and the husband dies an apostate, she shall be heir to her husband; because, when the woman became a Moslem, the *Nikah* was dissolved, and the reason of the dissolution was the apostasy of the husband, and his apostasy is equivalent to *Murz-ool-mout*; and, therefore, the husband became a *Farr*: if the husband returns to

Islam, then if the woman dies, the husband shall not be heir if the woman had become an apostate whilst in health, because a woman's apostasy is not regarded as *Murz-ool-mout*, and, therefore, the wife does not become a *Farr*, and the dissolution of marriage had cut off all relationship of husband and wife, and the parties had become strangers: if the woman's apostasy was whilst she was in sickness, then she becomes a *Farr*, and the husband shall be her heir].

2929. (2029.) When the wife whilst she is sick, has sexual intercourse (*Taawut*) with her husband's son, and then dies during her *Iddut*, (resulting from the dissolution of marriage consequent on such intercourse), her husband shall inherit to her, reasoning from (*Istihsan* or) weak analogy (because—see Rudd-ool Moohtar, Volume II, page 868—the woman's act was the cause of the separation; and her intention must have been to deprive the husband of the inheritance: she was, therefore, a *Farra*).

2930. (2030.) A woman, whose husband had divorced her thrice and then died, says, that the divorce was whilst he was sick (she, therefore, claims that the man was a *Farr*, and that she is entitled to inherit); but the heirs say that the divorce was in health, then (in the absence of any evidence to the contrary, the divorce shall be regarded as having been given in sickness, and) the woman's word shall be believed.

2931. (2031.) And if the wife, who is the slave (of another), is emancipated, and the husband dies, and the woman claims to have been emancipated whilst her husband was alive (she saying that the emancipation took place first and the death afterwards, because, in the event of the emancipation taking place before the death, she would have the position of a free woman and would inherit to her husband), and the heirs claim that the emancipation took place after the husband's death, the word to be believed is that of the heirs. And if the master says, "I had emancipated her during the life of her husband," the word of the master shall not be accepted (because he is interested in the question; because if she gets the inheritance, the master would be entitled by *Willa* to inherit to the woman who is now free and whose property, in the event of her leaving no heir, would go, at her death, to the person, who was her late master: as a slave she had no capacity of inheritance, it is only after her freedom that she gets a title to inherit).

2932. (2032.) So also if the woman is a *Kitabya* under a Moslem husband, and she becomes a Moslem, and her husband dies, and she says

"I became a Moslem during the lifetime of my husband," and the heirs say, "No, on the other hand, she became a Moslem after the husband's death," the word to be accepted is that of the heirs (in the absence of *byyuna* or evidence).

2933. (2033.) A sick man divorces his wife (whilst he is sick, which would not deprive the wife of her right of inheritance as the husband would be a *Farr*) the wife then kills her husband: she shall not be entitled to inherit.

2934. (2034.) And if the sick man says to his wife, who is (the) slave girl (of another), "When thou shalt be emancipated, then thou art divorced thrice;" and if her *Moula* then emancipates her (and the divorce comes into operation, and her *Iddut* commences); and if the husband then dies whilst the woman is still in her *Iddut*: she shall be entitled to inherit (see note to paragraph 2027).

2935. (2035.) And if the husband (who is sick) says to his wife, who is the slave (of another),—"Thou art divorced thrice to-morrow;" and afterwards her master (or *Moula*) says to her, "Thou art a free woman to-morrow;" or the *Moula* makes the commencement first, and the husband makes the statement afterwards; and the morrow arrives: both the divorce and the emancipation shall take place, and the woman shall not inherit (because slavery is a cause of deprivation of heirship, and here both the divorce and the emancipation take place at once when the morrow arrives: the husband is not a *Farr*, because the wife was a slave and not entitled to inheritance).

2936. (2036.) And if the *Moula* says to his female slave, "Thou art free to-morrow;" and her husband says to her, "Thou art thrice divorced after to-morrow;" then if the husband knows, at the time he says so, that the woman's master has made the declaration, he shall be held to be a *Farr* (provided the husband's statement was made whilst he was sick: obviously it was made to deprive his wife of her right of inheritance: if he says so whilst in health, he is not a *Farr* in any case): not otherwise, (that is, if the husband did not know of the master's declaration, he is not a *Farr*, although he might be sick at the time of making the statement; because this is a case in which the woman, on account of her slavery, could have no right of inheritance).

2937. (2037.) A man emancipates his female slave whilst she is the wife of another; her husband then divorces her thrice whilst he is sick,

he previously knowing (*i. e.*, knowing before giving the divorce), that the master has emancipated her: he shall be considered to be a *Farr* (and his wife shall not be deprived of her right of inheritance, which he knew was secured to her by her emancipation).

2938. (2038.) When a Moslem, who is sick, says to his *Kitabya* wife, "When thou shalt become a Moslem, then thou art divorced thrice," (apprehending that if she were to become a Moslem before his death, she would inherit to him); she then becomes a Moslem, and the husband then dies: the husband shall be held to be a *Farr*.

2939. (2039.) A woman lays claim against her sick husband that he divorced her thrice, and the husband denies the allegation, and the Kazee administers oath to the husband, who takes the oath (in support of his statement that he has not given the divorce); the woman then confirms the husband (saying he did not divorce me and my claim is false); the husband dies; then if she reverts to the confirmation before the husband's death (that is, if before her husband's death, she confirms his statement of there having been no divorce), she shall be entitled to her inheritance; but if she reverts to the confirmation of the husband's statement after his death, then her confirmation is not valid (and she shall be bound by her statement that there was a divorce, and she shall not inherit).

2940. (2040.) A sick man says to his two wives, "If you two shall enter the house, then you two are divorced thrice;" then both of them enter the house at once; the husband then dies, whilst they both are in their *Iddut*: both shall inherit to the husband (because the man became a *Farr*). But if one of the wives enters the house before the other, then she, who enters first shall inherit to the husband, but the second wife shall not inherit.

2941. (2041.) A man, whilst in health, says to his wife: "When I and so and so desire, then thou art divorced thrice;" and he then becomes sick; and the husband and the stranger both at once desire the divorce, or the husband desires the divorce, and afterwards the stranger desires the divorce; and then the husband dies: the wife shall not be entitled to inherit. But if the stranger first desires the divorce and afterwards the husband desires it, then the wife shall inherit (because here the stranger's wish is not effective, and it is not until the husband desired the divorce that the divorce came to be caused, and, therefore, the husband is considered to be a *Farr*).

[NOTE to paragraphs 2040 and 2041. See Bahur-ool Raik, Volume IV, page 52, where the case in paragraph 2041 is exactly set forth and explained. The same reason applies to paragraph 2040. The reason for the rule in 2041 is this: the divorce depends on the wish both of the husband and the stranger; therefore the wish of only one of the two cannot be the cause of the divorce; but the wish of both, whether found at once or one after the other, is the cause of the divorce; so that the divorce is caused in all three cases; *viz.*, (1) when both the husband and stranger wish the divorce at one and the same time; or (2) when the husband declares his wish first and the stranger afterwards; or (3) *vice versâ*. But (I) when both of them wish the divorce, the wife shall not be the heir; because the divorce does not take place simply by the act of the husband; in other words, the husband's wish is not the full cause or *Illut-i-taam* for the happening of the divorce: so also (II) if the husband makes the commencement and wishes the divorce, there can by his wish alone be no divorce, but when the stranger afterwards wishes the divorce, then the wish of both of them is now found, and the woman shall become divorced, but she shall not inherit; because the divorce was completed by the subsequent wish of the stranger: in both these cases (I) and (II) although the divorce has become effective, still the husband is not a *Farr:* but if the stranger makes the commencement and wishes the divorce, and the husband afterwards wishes it, then the divorce is effective as in the two aforesaid cases (I and II) but the husband shall be a *Farr;* because the stranger's wish does not cause the divorce, and the divorce would not have been caused if the husband had not desired it, and, therefore, here the divorce depends on the act of the husband within the rule set forth in the note to paragraph 2027. As regards the case in paragraph 2040, the act of both the wives is the cause of the divorce, and each is a stranger as regards the other; therefore, when both of them entered the house at once, the divorce was caused on each by the joint act emanating from her and from the other wife, and the act of the latter is that of a stranger so far as the former is concerned; therefore the cause of the divorce on each is the act of a stranger within the rule set out in the note to paragraph 2027; and, therefore, the husband would be a *Farr;* and if one wife enters the house first, then by her entry alone there is no divorce at all, and when the second wife enters the house, then divorce is caused on both, whereas if she had not entered the house, there would have been no divorce at all on either;

therefore the act of the second was the cause of the divorce; the first wife shall, therefore, inherit, and the husband shall be a *Farr* to the extent to which she is concerned, because her divorce was caused by the act of a stranger, who is the second wife; and the second wife shall not inherit because her divorce took place by her own act, and the husband shall not be a *Farr* to the extent to which she is concerned, because she herself did an act to her own detriment].

2942. (2042.) And when separation takes place between the spouses by an act (that is, at the initiation) of the wife, whilst the wife is sick, and then the wife dies during her *Iddut* (consequent on the separation); then if the separation amounts to divorce, such for example, as the separation which takes place, at her instance, on account of the husband's *Joob* * * * * * * (before marriage) or impotency, or *Lian*, then, according to Aboo Haneefa, on whom be peace, the husband shall not inherit to the wife (because the separation being tantamount to divorce, and divorce being the act of the husband, he must be considered to have himself put an end to the relationship of husband and wife, and given up his right,—the divorce in the cases supposed being a *bain* divorce); but if the separation does not amount to divorce, such for instance, as the separation which takes place by reason of an infant female exercising her option of puberty, or by reason of the woman exercising her option of freedom, or by reason of the wife becoming an apostate, then the husband shall inherit to her. (Because, in the case of divorce, the divorce is the act of the husband done in health, and, therefore, there is nothing to prevent his act done in health from being operative as regards inheritance; but if the separation partakes of an act as emanating from the wife, who is sick, then the act shall not have its natural effect so far as inheritance is concerned).

2943. (2043.) A man says to his wife, "When I shall become sick then thou art divorced thrice;" he then becomes sick and dies of that sickness, whilst the wife is still observing her *Iddut*: the wife shall inherit to him (because his intention was to deprive his wife of her right of inheritance, and he shall be considered to be a *Farr*: and although he was in health at the time he made the oath, still the effect of the oath was that when he became sick, then, by a fiction of law, he must be held to have uttered the words,—"thou art divorced"); but Abool Kassim Suffar, on whom be peace, says, that the woman shall not inherit (because the conditional oath was expressed while he was in health, and

the fulfilment of the condition is not the act of the husband, and, therefore, the man may not be considered to be a *Farr*). But the correct view is that laid down first.

2944. (2044.) A woman says to her sick husband, "Divorce me," and he divorces her thrice, and dies afterwards whilst the woman is observing her *Iddut:* she shall be entitled to inherit; because the husband (in effect) made a commencement (by giving three divorces, instead of responding to her request by giving her only one divorce), and, therefore, her right to the inheritance shall not become void; just as if she were to say, "Give me a revokable (*Rujue*) divorce" and the husband were to divorce her irreversibly. (Compare this with paragraph 2018).

2945. (2045.) When a consumptive husband divorces his wife, and the consumption becomes chronic, and does not make the man thin, then he must be regarded as in health (so that if he dies afterwards, his acts are not to be impugned on the ground of his sickness).

2946. (2046.) But as to the cripple (*Mookaad*) and the paralytic, it is laid down in the *Kitab* (or the Book of Mahomed) that if the cripple condition and the condition of paralysis are not of long duration, then the man is just like a sick man, and he shall be held to be a *Farr* (if he divorces his wife, and then dies before the expiry of the *Iddut*); but if the cripple condition and the condition of paralysis are of long duration, then the man is just like a man in health; because, in such a case, the disease is (or becomes) old (or chronic), and is not a killing disease. And the Mashaikhs have entered into a discussion regarding the same; and Mahomed, son of Sulma, on whom be peace, has said that if there is hope that the disease will be got over (or cured) by medication, then the man is just like a sick man, but if such hope is not entertained, then the man is to be regarded as in health; and Aboo Jaffer Hindwany, on whom be peace, has said that if the disease increases daily, then the man is to be regarded as a sick man; but if the disease increases at one time and decreases at another, then it will have to be seen if after the disease the man dies in one year (that is, not before one year from the attack), and in this case the man is just like one in health; but if he dies before one year, then he is just like a sick man. And Aboo Nusur Iraky, on whom be peace, has reported from our As'habs (i.e., the three Imams, *viz.*, Aboo Haneefa, Aboo Yusoof and Mahomed—see Rudd-ool Moohtar, Volume III, page 701: and Mashaikhs mean those learned lawyers who were not contemporaneous with Aboo Haneefa) that it

is to be seen if the man says his prayers sitting, and in this case he is like a sick man; but if he says his prayers lying down on his side, then he is like a healthy man (because in the former case, there is an apprehension of his getting worse and becoming disabled from saying his prayers in a sitting posture, but if he has, for a time, been saying his prayers lying on his side, then he cannot get worse, and that mode has become habitual to him).

2947. (2047.) And the learned have also entered into a discussion as regards a man who is incapacitated personally from managing his affairs outside the house, but is capable of managing his affairs inside the house (whether such a man is to be regarded as one in health or as a sick man): the Mashaikhs of Balkh, on whom be peace, have laid down that when the man is capable of managing his own necessities (*e.g.*, obeying the calls of nature, &c.), whether such necessities are (discharged and met with) inside the house (as when the privy is inside the house) or outside the house, then he is just like one in health; and our Mashaikhs, on whom be peace, have held that when the man is incapable of managing his affairs outside the house, he shall be regarded as sick: and verily have we already referred to this matter. (See paragraph 2020).

2948. (2048.) A sick man divorces his wife (*i.e.*, his intention is to become a *Farr*) and then dies after a time; and the wife says, "My *Iddut* has not yet expired" (the object being to get inheritance, because if after divorce by the sick husband the latter dies within the *Iddut*, then the relationship of husband and wife is not cut off): then the word to be accepted is her word with her oath, (because as regards menses and like matters, within the special knowledge of the wife, her word is to be accepted); but if she refuses to take the oath, then she shall not inherit; and if she takes the oath, she shall inherit. And if the wife says nothing (whether her *Iddut* has expired or not) and marries another man before the death of the sick man, after a time (from the date of the divorce), so that it is possible for her *Iddut* to have expired (within that time, if the *Iddut* were to be reckoned from the divorce), but she afterwards (whether during her first husband's lifetime or after his death) says (for the purpose of establishing her right of inheritance), "my *Iddut* has not expired:" her word is not to be accepted. And if she, instead of marrying again, says, after divorce "I have reached the age of an *Ayasa*" (when the menses are cut off and when her *Iddut* becomes three months) and then her husband dies after the expiry of three months

from the time of her admission (or statement relating to her being an *Ayasa*) then there is no inheritance (because the period of three months is the time of *Iddut* for an *Ayasa*, and the husband dies after the *Iddut*); and if she marries a second husband (after the death of the first husband within the three months of her statement as aforesaid) and gives birth to a child by the second husband, then she shall be entitled to inherit to the first husband, and the second marriage shall be invalid; (because the case shews that her statement that she had become an *Ayasa* was wrong; and therefore her *Iddut* from divorce was not three months but three menses; the case also shews that her *Iddut* from divorce which consisted of three menses did not expire before her husband's death; therefore the death of the husband took place before her *Iddut* from divorce had expired, and therefore she shall inherit from her husband who thus became a *Farr;* and the husband having died before the expiry of her *Iddut* from the divorce, this death rendered it necessary for her to observe a second *Iddut*, *viz.*, that for the death of her husband—see paragraphs 1965 to 1995—and the second marriage having taken place before the expiry of the *Iddut* of her first husband's death, her marriage with the second husband became *Fasid* or invalid—See Volume I, Fatawai Alumgiree, pages 641 and 642): but if she does not give birth (in the same case) to a child after the second marriage, but says, "I have got my menses," it is permissible to the second husband to refuse to confirm her, and the second marriage shall not be valid, and she shall be regarded like a (*Motudda* or) woman observing her *Iddut* who has admited that the *Iddut* has expired, and who, therefore, married a second husband, and then denies the expiry of the *Iddut*, in which case it is not proper to accept her denial.

God knows best.

Section V.

ON NUSUB OR DESCENT (AND PARENTAGE).

2949. (2049.) [Note.—*Nusub* means relationship to forefathers or *Kurabut-i-Abai*. See Moontuhul-Arab, a well recognized and an authoritative Arabic Lexicon in general]. A woman gives birth (to a child) after the death of her husband within two years of his death; then, if the woman is confirmed by (some or all of) the heirs in the fact that the birth did take place within two years, then the *nusub* (or descent) of the child shall be established in the deceased as against him (the particular heir)

who so confirmed the woman. Will the parentage be established as against other than those who so confirm her? If those who so confirm her make up the number necessary for the admissibility of the evidence (for the proof of a fact according to Mohamedan Law), then the descent shall be established (*e.g.*, a fact must be proved by two sane and adult men, or by one man and two women: therefore, if those who so confirm the woman are two men, or one man and two women, then the fact of the birth within two years of the husband's death must be held to be proved, and the descent must be held to be established generally).

Is it necessary for those, who so confirm her, to use the word "evidence" (and say, we give evidence or testimony) in order that the descent should be established (in the deceased) as against heirs other than those who so confirm the woman as aforesaid? The learned lawyers have differed in this matter; some of them have said that the use of the word "evidence" is not necessary; whilst others have said that the use of the word "evidence" is necessary, just as the full number of witnesses is necessary.

And if the heirs deny the birth (*i.e.*, either deny the fact of the birth altogether, or that it took place within two years of the husband's death), then the fact of the birth shall not be held to be proved, nor the descent, except when there is available the testimony of two men or one man and two women according to Aboo Haneefa, on whom be peace; but his two disciples have said, that the same shall be held to be proved by the testimony of the midwife (instead of it being necessary to produce two men or one man and two women).

2950. (2050.) So also as regards a woman, who has been irreversibly divorced (*Mubtoota*) or who has been reversibly divorced, when she claims to have given birth to a child, according to Aboo Haneefa, on whom be peace, the fact of the birth shall not be held to be proved by the testimony of the midwife, except when the pregnancy was apparent (during the period of her *Iddut*) or when the husband had admitted the pregnancy.

2951. (2051.) And the learned lawyers have agreed (made *ijma*) on this that when the *wife* says to the husband, "I have given birth from thee" and the husband makes a denial (that is, denies the fact of the birth of the child by the woman at all, or that he was the father), then the fact of the woman having given birth to the child shall be proved by the midwife and (in the case of his denial of the paternity) it shall be ordered

that the two shall make *Lian* as between them; and if the *Lian* becomes prevented by a cause proceeding from the husband, then he shall be liable to the (*Hudd-i-Kuzuf* or) punishment prescribed for making a false accusation of adultery against his wife.

2952. (2052.) All this (that is, what has been laid down as rules in paragraphs 2049 and 2050) is true when the woman has made no admission that the *Iddut* has expired; but if she makes an admission of the expiry of the *Iddut* after a time within which it is possible for the *Iddut* to expire, and then gives birth at (or after) six months from the time of the admission (of the expiry of her *Iddut*), then the *nusub* of the child so born shall not be established in the husband (because it is possible that she may have conceived after her admission); and if she gives birth within six months from the date of such admission, then the *nusub* of the child so born shall be established in the husband; and the admission made by the woman (regarding the expiry of the *Iddut*) shall become void.

2953. (2053.) When an *Ayasa*, who is observing her *Iddut* with reference to months, gives birth to a child, then the descent of her child shall be established, in the case of divorce by the husband, up to two years from the divorce, whether the woman makes an admission regarding the expiry of the *Iddut* or does not make such an admission.

2954. (2054.) And if the husband divorces his minor wife after having had sexual intercourse with her, and she then gives birth to a child; then, if she makes an admission after three months (from the divorce) of the fact that her *Iddut* had expired (her *Iddut* being three months and not three menses) and then gives birth to a child within six months (from the time of her admission of the expiry of her *Iddut*), the *nusub* of her child shall be established in him (because then her admission was incorrect); but if she gives birth more than six months (after her admission regarding the expiry of such *Iddut*) then the descent shall not be established.

And in this matter (*i.e.*, in regard to a minor wife) a reversible (*Rujue*) divorce and an irreversible (or *bain*) divorce are both equal; (that is, if the birth takes place within six months from the admission regarding the expiry of her *Iddut*, then the *nusub* shall be established, but not if it takes place after six months).

And if the minor wife (as aforesaid) does not admit that the *Iddut* has expired, but claims that she is pregnant; then if the divorce was (*bain* or) irreversible, the descent (of the child born of the pregnancy) shall

be established up to two years (that is, within two years) from the time of the divorce (and it shall be held that the husband has had intercourse before giving her the *bain* divorce); and if the divorce was reversible, then the descent shall be established up to (that is, within) seven and twenty months (from the time of the divorce, that is, three months of the *Iddut* and twenty-four months, the longest period of gestation). And if she does not claim to be pregnant, and does not make an admission of the expiry of the *Iddut*, then Aboo Haneefa and Mahomed, on whom be peace, have said, that this case and the case where she admits that her *Iddut*, reckoned as three months, has expired, are equal (*viz.*; if the birth takes place within six months from the admission, then the *nusub* shall be established; but not if the birth takes place at or after six months from such admission); but Aboo Yusoof, on whom be peace, says, that this case and the case where she claims to be pregnant are equal (that is, if the divorce is *bain*, *nusub* shall be established if the birth takes place within two years; and if the divorce is reversible, then the *nusub* shall be established even if the birth takes place within twenty-seven months).

2955. (2055.) When a woman, who is observing her *Iddut* from an irreversible (*bain* or complete) divorce, marries another husband during the *Iddut*, and gives birth to a child after the second marriage; then, if she gives birth in less than two years from the divorce by the first husband, and in less than six months from the time of her marriage with the second husband, the child shall belong to the first husband; but if she gives birth in more than two years from the time of the divorce given by the first husband, the child shall not be obligatory (or *lazim*) on the first husband; and then it should be seen if she gives birth in six months (*i. e.*, at or more than six months) from the time of the marriage with the second husband, (if so) the child shall belong to the second husband, but not otherwise (that is, if she gives birth within six months of the second marriage, then the parentage in the second husband shall not be established, and the child shall be a *Wulud-ool Zina*).

2956. (2056.) A man marries a woman and she gives birth to a child; and the husband says, "I have married thee four months ago;" the woman says, "Thou married me six months ago:" the word to be accepted shall be that of the wife (on oath in the absence of witnesses) and the child shall be the child of the husband.

2957. (2057.) A man marries a female slave (belonging to another), and then divorces her, and then purchases her; and she gives birth to

a child in less than six months from the time of the purchase, the child shall be obligatory on the man (because—see Shureh Vekaya, Volume II, pages 104 and 105—it appears quite clearly that the conception took place before the purchase, and the child born is the child of a *Munkooha* or wife, and not that of an Amut or slave girl, and, therefore, *Daiwut* or claim by the father in regard to the *nusub* of the child is not necessary); but if she gives birth to the child in six months (that is, at or more than six months) from the time of the purchase, then the child shall not be obligatory on him (*i.e.*, mere birth shall not lead to *nusub*, but there must be a *Daiwut*).

This rule holds good (that is, the establishment of parentage without a *Daiwut* in the case of the birth within six months, and not without a *Daiwut* in the case of the birth at or after six months) when only one divorce (whether *bain* or *Rujue*) was pronounced by the husband; but if the husband has given two divorces to the woman, then the descent shall be established in that husband, in the case of the birth up to two years (that is, in less than two years) from the time of the divorce (because by two divorces the slave wife becomes absolutely *Haram* or unlawful, in the same way as a free wife becomes absolutely *Haram* by three divorces: and after two divorces, the slave wife must marry a new husband before she can be lawful to the first husband either by marriage or by ownership of purchase; therefore, if, after two divorces, the slave wife gives birth within two years, then it must be held that the conception was before such divorce, and it shall not be held that the conception was after the divorce and at the time he had already purchased her, because the slave wife became absolutely prohibited to him, and he could have no intercourse after purchase with her unless she were to marry another husband. See Chulupy on Shureh Vikaya, Volume II, page 105.)

God knows best.

APPENDIX I

TO

VOLUME III OF THE TAGORE LECTURES OF 1891-1892.*

JOINING TWO SISTERS IN CONSECUTIVE MARRIAGES.

The question in this case is this:—A Soonnee Mahomedan, having married two sisters, likewise Soonnee Mahomedans, one after the other, and having children by both wives, dies,—are the children by the second wife legitimate; and are they entitled to participate in the inheritance left by the deceased as his legitimate children? I appear for the first wife and her children, and I maintain the negative of these questions. These questions depend upon the following considerations,—Was there a valid marriage between the deceased and the second wife; if not, can the *Nusub* or parentage of the children by the second wife be established in the deceased by some other rule of the Mohamedan Law?

2. As regards the marriage itself, I will show that, according to the rules of Jurisprudence or Oosool-i-Fikah, and also according to express authorities, the so-called marriage was not a valid marriage at all; and that the same was *Batil* or void, by which admittedly *Nusub* is not established, and not *Fasid* or invalid, that is to say, defective, informal or vicious, by which it is supposed that *Nusub* is established. I will also be able to show that if the question is capable of being regarded in the light of what is called a *Moojtahid-fee* matter, (see paragraph 69) even then the weight of authority and reason is on my side of the question.

3. According to the Mohamedan Law, the notion of a marriage is a legal notion or, as it is called by the Oosoolleen or Jurists, Amr-i-Shurayee,

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* This appendix contains a summary of the arguments of the Hon'ble Moulvee Mahomed Yusoof, Khan Bahadoor, on behalf of the appellant, in Appeal from Original Decree No. 231 of 1892, decided on the 23rd July, 1895, by a Bench of the High Court, consisting of the Hon'ble Sir William Comer Petheram, Kt., Chief Justice, and the Hon'ble Mr. Justice Beverley, whose decision, to the effect that, under the Mahomedan Law, marriage with the sister of a wife, who is alive and who is legally married, is void, is reported in I. L. R., XXIII Cal. Series, page 130. The appendix to that decision contains translations of various passages from the original authorities bearing on the question raised: and these translations, having already appeared in print along with that decision in the Indian Law Reports, are not reproduced in this volume, although they relate to the subject of these Lectures.

that is to say, it is a legal idea as contradistinguished from what may be termed a physical or actual idea,—an idea or notion which depends for its completion and realisation only on the senses—or as it is called Amr-i-Hissee, that is, a thing which is realized through or by means of the organs of the senses, and completed by visual facts and by things cognizable by the senses, and which has only a physical existence; but a legal idea is that which has a legal existence; to laugh has a physical existence; to kill has a physical existence, but murder has a legal existence, although, no doubt, it has partially a physical existence. The Tawzeeh, a work on Jurisprudence, gives, amongst other instances of a legal idea, a case of sale. The case of a sale and the case of a marriage are parallel to each other in most essential elements (I). Both sale and marriage partake of the physical and sensual or the Hissee element and of the legal or Shurayee element; the sensual or physical element consists of *Ijab* and *Kubool*, that is to say, proposal and acceptance, which consist of words uttered and spoken, and which are brought into physical existence by means of the external organs, and the senses take cognisance of them; but they also, at the same time, partake of the legal element by which the proposal and the acceptance come to be connected with and related to each other, so as to be productive of a legal result; and that legal result, in the case of a sale, consists in the creation of ownership and title to possession in the purchaser; and in the case of marriage, consists in the creation of ownership of enjoyment by the husband as regards the person of the wife, and it also creates corresponding rights in the wife.

4. As instances of Amr-i-Hissee are cited *zina* or whoredom, and the drinking of wine, and these are made up of acts which depend only on the organs and the senses.

5. Generally speaking, ideas which existed before the advent of our Prophet, and in which no changes have been made by our *Shera*, are what are called Amr-i-Hissee or Afaal-i-Hissee; but things in which rules and conditions relating to their legal existence came to be laid down by the Mohamedan Law, either for the first time, or so as to involve a change as compared with the law previously existing, are called Afaal-i-Shurayee.

6. There is much which is in common to marriage and sale, and other creatures of the *Shera*. Their nature, according to the Mohamedan Law,

(I).—See Tawzeeh, page 259, *Calcutta Edition*, printed in the year 1245 Hijree.

may be learnt from the disquisition of the Jurists on the subject. The Tawzeeh (II), while discussing the question of *Nuhee* or negative commands, goes into the question whether it is in human power to create or bring into existence a legal idea, such as a sale for instance, seeing that it is an axiom of faith that God is the creator of everything, and man is powerless to bring a thing into existence; and the author deals with the matter in this way: God has ordained certain words to be used for certain purposes: He has laid down that if the words of sale, for instance, are used by a person competent and duly qualified, in favor of another person, in reference to a fit subject, then the result shall necessarily be a sale; it is, therefore, within human power to create a sale in the sense that it is in the power of an individual to use those words with reference to a fit subject; and such words having been used, the result provided for by law must necessarily follow. Conversely, therefore, it would appear that the result would not be achieved unless the prescribed words are used in the way prescribed by God, and under the conditions laid down in that behalf, that is, by a competent person in reference to a fit subject; because it is only in reference to a fit subject that God has ordained that the particular result should be accomplished and achieved.

7. Bearing in mind this principle, sale and marriage are divisible into three classes. The first class is that which is perfect in all respects, *viz.*, in which there is no sort of defect whatever: this class is called a *Suheeh* or valid sale or a *Suheeh* or valid marriage. A valid marriage is one which satisfies all the essentials of validity, *e.g.*, existence of proposal and acceptance; presence of witnesses; competency to contract; fitness of the subject of marriage, and so forth. The third class is that which is no marriage at all, and in which words of proposal and acceptance are uttered in vain: the defect is of such a radical and vital nature that the legal result, which is ownership or lawfulness of enjoyment, does not flow, and is not produced: such a marriage is called a *Batil* or void marriage, that is to say, it is a thing which, it is a misnomer to call marriage, because it is not productive of the result of lawfulness of enjoyment; it is just as if the marriage had not taken place at all, though it may be called a marriage in a metaphorical and popular, but not in a real and legal sense; and this is the case where, for instance, the subject of the marriage is not a fit object of marriage,—God having

(II).—See Tawzeeh, pages 262-263.

ordained such subject to be unlawful or *Huram* to the particular individual. Within these two classes, it is supposed that there is a class which, though not absolutely valid, is not, at the same time, absolutely void; this is supposed to be the second class, and it is called a *Fasid* or invalid, defective or vicious marriage: this is the case where the subject is a fit one for marriage, and the woman is lawful to the particular man for enjoyment after and by reason of the marriage, but where a condition essential to a valid marriage is wanting, *e.g.*, the presence of witnesses (III).

8. Some of the Jurists and Commentators assign very sound reasons for their opinion that there is no second class in marriage; and that there could be no such thing as a *Fasid* marriage. A marriage is either good or it is void, that is, it is either *Suheeh* or it is *Batil;* in other words, a marriage is either a legal and valid marriage, or no marriage at all, although in cases of sales it is possible to imagine such a thing as a *Fasid* sale; because the object of marriage is legality of enjoyment or *Hill-i-Istimta*, but the object of sale is ownership or *milk*, though such ownership sometimes leads to legality of enjoyment from a sexual point of view, as in the case of the purchase of a slave girl: the object of sale is to create ownership and not necessarily legality of enjoyment, because sale is sometimes valid in cases which are not legally susceptible of enjoyment from a sexual point of view, as in the case of the purchase of a male slave, or where there is *Hoormut* or illegality of enjoyment, as in the case of the purchase of a slave girl who is a *Mujoosee* woman (IV). In the so-called *Fasid* marriage, the marriage is not valid, and union of the parties is not legal either in its inception or continuance; because if it were legal, why should the Kazee be enjoined to separate the parties on the fact coming to his knowledge. The distinction between *Batil* and *Fasid* marriages is only important in so far as that distinction sometimes regulates the rule regarding the obligation to *Iddut* (V). But some of the authors have

(III).—See these Tagore Lectures, Volume III, page 365, paragraph marked (XV). See also I. L. R., 23 Calcutta Series, page 166, 3rd para.

(IV).—See Tawzeeh, pages 270-271. See also the Tulweeh, which is a Commentary on the Tawzeeh, Nawal Kishore's Edition of Lucknow, page 297, where, in the annotation in Note 2 taken from the Chulapy, there is a discussion in connection with the question relating to a *Nikah* without witnesses whether the term *Fasid* when applied to *Nikah* does not always mean *Batil*.

(V).—See passages translated from the Rudd-ool-Mohtar in I. L. R., 23 Calcutta Series, page 166, line 20, &c.

given the name of *Fasid* marriage to a marriage which they could not consistently refer to either the *Suheeh* or the *Batil* class. In this connection it will be useful to know what the author of the Rudd-ool-Mohtar has to say in a portion of the work which is translated in these Tagore Lectures, and, in fact, the whole of the chapter from the Rudd-ool-Mohtar so translated will well repay perusal (VI).

9. The distinction relating to the class of *Fasid* marriages is susceptible of further illustration by reference to arguments called *Boorhan-i Limmee*, or arguments from *Limm*, *i.e.*, from cause or *Illut* to effect or *Malool*, and *Boorhan-i-Innee* or argument which is *In*, *i.e.*, apparent or *Zahir*, that is, argument from effect to cause. Smoke being the effect of fire, if you argue that because there is fire, there must be smoke, this is called *Boorhan-i-Limmee;* you argue from *Illut* or cause towards *Malool* or effect; so also if you say, because there is sunshine it must be day. On the other hand, if you argue and say because there is smoke there must be fire, or because there is sunshine therefore there must be the sun, this is called *Boorhan-i-Innee.* Referring to *Nikah*, the lawyers look upon it in two ways: one is this,—*Nikah* is an institution, the object of which is *Hill-i-Istimta*, or lawfulness of enjoyment; where, therefore, there is no lawfulness of enjoyment, there is no *Nikah.* If there is lawfulness of enjoyment, there is *Nikah*, and the *Nikah* is *Suheeh.* If there is no lawfulness of enjoyment, there is no *Nikah*, and therefore the *Nikah* is *Batil;* because *Batil* is a thing which has no existence in the *Shera.* Viewed in this light, there is no intermediate class such as *Fasid* in an institution such as *Nikah.* But it must be conceded that even when viewed in this light, *Batil* marriages come to be divided into two classes, *viz.*, a *Batil* marriage in which there is *Shoobha-i-Muhul* and in which there is an obligation to *Iddut*, and right of *Nusub; e.g.*, a marriage in the absence of witnesses (VII); and the second class of *Batil* marriage is a marriage in which there is merely *Shoobha-i-fail*, and which does not result in the establishment of *Nusub* or the obligation of observing the *Iddut.* Other lawyers classify *Nikah* according to *Ahkam* and *Asar*, or result and effect. *Nikah-i-Suheeh* is where there is *Hill-i-Istimta* or lawfulness of enjoyment, and the result and effect of *Nikah-i-Suheeh* is the obligation to *Iddut*, and the establishment of *Nusub*, and other matters. As

(VI).—See these Tagore Lectures, Volume III, page 362, paragraph marked (VI).

(VII).—See I. L. R., 23 Calcutta Series, page 166.

opposed to *Nikah-i-Suheeh*, there is the *Nikah-i-Ghyr-Suheeh*, in which there is no *Hill-i-Istimta*, or lawfulness of enjoyment; this class is subdivided into two other classes,—one in which none of the effects of *Nikah-i-Suheeh* is to be found, and this class is called *Batil*, and the other class is where some of the effects of *Nikah-i-Suheeh* are found; as for instance, the obligation to *Iddut* and the establishment of *Nusub*; this class may not and need not be called *Batil*, and, therefore, it is called *Fasid* by analogy. But the result and effect of a valid marriage or *Nikah-i-Suheeh* will only be found where the *Muhul* is *Saleh* or fit, but some condition of validity of marriage is wanting; such for instance, as the condition of the presence of witnesses: but where the *Muhul* is not *Saleh*, there the result and effect of a *Nikah-i-Suheeh* will not be found.

10. There is one point in connection with the use of the terms *Batil* and *Fasid*, which must not be lost sight of in construing the original texts, with a view of correctly appreciating the meaning of the Arabic Authors. These terms are sometimes used as convertible terms, that is to say, the word *Batil* is sometimes used in connection with marriage, so as to denote a marriage, which deviates from the true and strict rule; and the word *Fasid* is also sometimes used in the sense thus indicated: again, *Batil* is sometimes used to denote that which is strictly speaking *Fasid* and *vice versâ*. It is, therefore, very necessary to know the real and precise signification of these terms and the difference that exists between them, quite apart from their use in relation to marriage; it is also necessary to ascertain the intention of a particular Author using those terms in relation to marriage, in order to find out his meaning in the use of those terms. No doubt, there are some Authors who have, in their work throughout, used the terms in accordance with their precise or exact signification. I will be able to point out in what sense those terms are used by a particular Author, and I think there will be no difficulty in conveying my meaning.*

11. It must not, however, be supposed, from the difficulty involved in the classification of marriages as pointed out above, that all marriages in fact are marriages in law; and it must not also, at the same time, be supposed that every marriage, in which there has been even the slightest deviation from the strictly prescribed rule, is no marriage at all: in other words, it must not be supposed, on the one hand, that *Nusub* is established in every marriage, however gross the deviation might be, or, on the other hand, that *Nusub* is not established in a marriage in which there has been even

* Subject to what has been set forth in the above paragraphs, I will continue to use the term Fasid in reference to marriage in this Appendix.

the slightest deviation. Later on I will attempt to propound generally the true rule where, the form of marriage having been gone through, *Nusub* is established, and where it is not. (See paragraphs 44, 49, 53 and 59 of this Appendix.)

12. It is unnecessary to discuss the *Suheeh* or the first class of marriage in detail. This class of marriage is, in every sense, perfect; and if a child is born of such a marriage at or after six months from the date of the marriage, the child is legitimate, without any regard as to the time of intercourse, and without any regard as to the question of access; and it is to this class that the principle, referred to in Mr. Justice Ameer Ally's work, (VIII) applies, that if the husband be living in the east and the wife in the west, legitimacy shall be established, and the intervention of the *Jinn* may be presumed. The reason is this, that the contract being perfect in all respects, the quality of goodness or beauty, that is, *Hoosn* or excellence as ordained by the law, is found in it, so that the essence of the contract is good and beautiful in all respects.

13. Accordingly, where the Hedaya (IX) opens the chapter with the words "Book on Marriage," the Kefaya, which is a Commentary on the Hedaya, in defining *Nikah* or Marriage, says, "*Nikah* cannot be created "except by its pillar (or *Rookn*) emanating from (an *Ahul* or) one who is "competent (to contract), in reference to one who is the (*Muhul* or) "subject of it, as in the case of other legal contracts; that the pillar (or "*Rookn*) consists of proposal and acceptance; that the (*Ahul* or) person "competent (to contract) is one who is (*Ahul* or) competent for all con-"tracts; *that the (Muhul or) subject of the marriage is she who is a fit* "*subject of the effect (or Hookm) of it;* that the (*Hookm* or) effect of it is "ownership and lawfulness (of enjoyment)." The same rule is laid down in the Inaya (X), that work being another Commentary on the Hedaya, where the *Muhul* is defined to be "a woman, to whose marriage there is no legal bar."

14. The Shuruh-Vikaya, a work written by the author of the Tawzeeh, (XI), shews that marriage is created for ownership of enjoyment; that it is a legal notion, and does not mean only proposal and acceptance, but the connection and admixture (or *irtibat*) that is, the

(VIII).—See Mr. Justice Ameer Ali's Mohamedan Law, Volume II, page 191.

(IX).—See Hamilton's Hedaya, Volume I, page 71.

(X).—See Inaya, Volume II, page 1.

(XI).—See Shuruh Vikaya, Volume II, page 1.

legal result, of proposal and acceptance, and this connection and admixture creates ownership, and this legal result can only follow when the subject is fit for enjoyment.

15. The next question is,—Is the wife's sister, during the lifetime of the wife, a fit subject or *Muhul* of marriage; if not, is the marriage *Fasid* or is it *Batil.*

16. The Koran ordains (XII) :—"Marry not women who are idolaters until they believe; and give not women who believe, in marriage to the idolaters until they believe."

17. The Koran also ordains: "Ye are forbidden to marry your mothers, your daughters, your sisters, your father's mother, your father's sister, your wives' mothers, your daughters-in-law (XIII); your sons' wives; *and ye are forbidden to take to wife two sisters* (XIV); ye are forbidden to take to wife free women who are (the) married (wives of others) except those women whom your right hand shall possess as slaves." (XV).

18. It will appear from the above enumeration of females that amongst those women who are thus prohibited, there are some who are permanently unlawful (*Huram-i-Moabbud*) whilst others are temporarily prohibited (*Huram-i-Mowakkut*); but both the classes are spoken of in the same terms, and the prohibition in regard to both classes is expressed by one and the same term, *viz.*, unlawfulness or *Hoormut*; thus shewing that in regard to unlawfulness both classes are equal and alike, and stand on the same footing. The *Hoormut* or unlawfulness being equal in both classes, it would, *prima facie*, follow that neither class is a fit subject or *muhul* of marriage, and the marriage of each of those, whose prohibition has been ordained in similar terms, is contrary to the Koran, and is null and void.

19. Now what is generally speaking the distinction between *Fasid* and *Batil.* In dealing with these and like terms and technical matters, it will suffice my present object to indicate generally the meaning and distinction therein involved. It is not my intention here to go into niceties and refinements, and details of explanation, which would necessitate the

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(XII).—See these Tagore Lectures, Volume I, page 8, para. 48 (44).
(XIII).— Do. Volume I, page 18, para. 119 (115).
(XIV).— Do. Volume I, page 19, para. 120 (116).
(XV).— Do. Volume I, page 19, para. 121 (117).

exposition of various portions of Jurisprudence in a more connected and amplified form than space will permit, or convenience of dealing with the subject in a fragmentary form instead of as a whole would admit of; for like reasons I refrain for the present from the discussion regarding the difference between *Amr* or affirmative command, and *Nuhee* or negative command, and *nufee* or prohibition of essence, and *nuskh* or abrogation, referred to in paragraph 6 and elsewhere of this Appendix.*

20. A thing or a contract is good and perfect, that is to say, valid or *Suheeh*, where conformity in all respects to the rules laid down, shews that the quality of goodness (or *Hoosn*) or excellence exists in it, and that not only the essence (*Ayn*) is good, but its quality (*Wusf*) and concomitant (*Moojawir*) are also good.

21. A thing or a contract is void or *Batil* where the essence (or *Ayn*) is bad, and as a consequence its quality (or *Wusf*) is bad, and its concomitant (or *Moojawir*), if any, is bad.

22. Between these two classes, that is, *Suheeh* and *Batil*, there are two other classes, *viz.*, where the essence (or *Ayn*) is good, but the quality (or *Wusf*) is bad; and this is termed *Fasid* or defective or vicious: and where the essence (or *Ayn*) is good, but the concomitant (or *Moojawir*) is bad; and this is termed *Mukrooh* or abominable.

23. In sales all four classes are found. A valid sale is where the contracting parties are *ahul*, or competent to contract, and the contract is with reference to a fit subject, or *muhul*, and the words prescribed by the law to effect a sale are found, and the other essentials are complied with. But where the subject is not a fit one; as for instance, where a person sells a free man, there the sale is void or *Batil*. A sale is *Fasid* or invalid where, for instance, the consideration is liquor or wine,—consideration being regarded as a quality or *Wusf* which, although it cannot be separated from the sale, is still not the *Ayn* or essence of the contract; or where, for instance, the sale is coupled with a condition which is itself invalid as not arising from the sale, but which is calculated to confer additional benefit to either of the contracting parties; or where, for instance, one dirhem is sold for two dirhems, and this is usury, which

* It is my intention to devote a future volume entirely to the Science of Jurisprudence, so as to present the subject in its entirety according to the view taken by Arabic Authors of acknowledged repute and authority.

defeats a necessary quality, that is, the equality of consideration. A sale is abominable or *Mukrooh* where a *Moojawir*, or a concomitant adjunct, which could be separated from the sale, is bad; as for instance, where a person sells during the call for Friday prayers, such call rendering it necessary for a true believer to leave his work and proceed to the mosque; but this defect may be cured, as for instance, where the seller obeys the call and starts from his house to attend the prayers, followed by the purchaser, and they conclude the sale on their way to the mosque (XVI).

24. Instances of other things, bad on account of *Moojawir*, might be given to illustrate the meaning. God prohibits and interdicts (XVII) intercourse with the wife during her courses, "because the courses are pollution;" but pollution is neither the essence of the intercourse nor its necessary quality; it is an adjunct or state, which sometimes exists and sometimes does not: here the prohibition is on account of badness of the adjunct or *Moojawir;* so that if the husband has intercourse during the wife's courses, and there is pregnancy, the child would be legitimate, and the husband's act, though sinful, is lawful and legal (XVIII).

25. But in *Nikah* or marriage there are, at best, only three classes, the abominable or *Mukrooh Nikah* not being ordinarily conceivable.

26. If rules had not been laid down specifically in the matter, then to lay down a rule of universal application to distinguish precisely between what is *Fasid* and what is *Batil* in all cases would be a matter of some little difficulty barring extreme instances; for what to some minds might appear as a necessary and inseparable *Wusf* or quality, might appear to other minds as a part of the essence or *Ayn*. This difficulty is enhanced when it is borne in mind that there is such a thing as a conflict between *Hoosn* or goodness and *Koobuh* or badness, where it is necessary to discriminate, no doubt, according to rules scientifically laid down with great precision, which element should have a preponderating effect so as to lead to a *Hookm* or general rule in practice. A thing is bad on account of its essence (*Kubeeh-lai-Ayn*) when all the parts and fractions of the essence are bad, or even where one part is bad; and that is what is meant by the class called *Batil*. A thing is bad on account of its quality or *Wusf*, where no part of the essence of the thing is bad, but where a

(XVI).—See Tawzeeh, pages 269-270.

(XVII).—See these Tagore Lectures, Volume I, page 8, para. 50 (46).

(XVIII).—See Tawzeeh, page 260.

Wusf or quality of it is bad. The quality of a thing is not its essence or part of its essence, but it may, all the same, be inseparable from it; and it is the inseparable quality of the Wusf which causes difficulty in discriminating it from the *Ayn* or essence, though it may not be difficult to distinguish between a separable quality and an inseparable quality, that is, between a *Wusf* which is *ghyr-lazim* and a *Wusf* which is *lazim*. In order to constitute a thing good for its essence (or *Hussun-lai-Ayn*) all its parts must be good or *Hussun*, and no part of it must be *Kubeeh* or bad; but in order to constitute a thing bad for its essence, it is sufficient that any one part of the essence is bad (XIX). The parts of a marriage consist amongst others of *proposal* and *acceptance* and a *fit subject*. And so far as marriage is concerned, it can be laid down broadly as beyond the possibility of a doubt that, other conditions being fulfilled, where the *muhul* or subject is not fit, there the marriage is void or *Batil;* but where the *muhul* is fit, and the defect lies in the want of some formality, which relates to the quality of the notion called marriage, there the marriage is *Fasid;* as for instance, the absence of witnesses, the presence of witnesses being regarded by some as a quality although a necessary quality which, according to us, cannot be separated from *Nikah;* but according to Shafee and Malik presence of witnesses is not necessary, and, therefore, according to them, a marriage without witnesses is a valid or *Saheeh* marriage. Another instance of a *Fasid* marriage is, where the marriage is temporary (XX); here the *muhul* is good, but a quality of validity is wanting—that quality being the absence of limit as to time.

27. Of the instances cited above from the Koran, there are some females whose unlawfulness or *Hoormut* is permanent or *Mooabbud*, and some whose unlawfulness is temporary or *Mowukkut*. Is there any ground for the distinction that the marriage of a woman permanently or perpetually unlawful is *Batil* or void, because the unlawfulness is permanent and cannot possibly be removed; and that the marriage of a woman temporarily unlawful is *Fasid* or defective, because the unlawfulness is temporary and might be removed? Whether permanently or temporarily unlawful, it will be observed that both are prohibited for marriage, and this prohibition has reference to the time of the marriage; but if there is a distinction between

(XIX).—See Tawzeeh, page 264.

(XX).—See Rudd-ool-Mohtar, Volume II, pp. 1000-1001, translated in these Tagore Lectures in, Vol. III, page 365, paragraph marked (XV).

permanent and temporary unlawfulness, how stands the right of enjoyment in the interval whilst the temporary disability lasts? Is the woman a fit subject of enjoyment whilst such disability lasts; if not, does she become a fit subject of enjoyment after such disability has ceased under the same initial contract of marriage?

28. According to the Mahomedan Law, lawfulness of enjoyment arises from two causes:—(Firstly) ownership of possession or *Milk-i-Rukbá*, as in the case of a slave girl lawfully captured in a lawful Jehad; and (secondly) ownership arising from a legal marriage. I have shewn above (see paragraph 6) that where certain given things are found, there the result is produced by the ordinance of God, and no human power can prevent that result; where the subject is fit and other matters are as they ought to be, the pronouncing of the formula of marriage must produce the legal result as certainly as results are produced in physical matters: the legal result of marriage is present lawfulness of enjoyment and not future or prospective lawfulness of enjoyment after the disability in the woman shall have ceased. If, therefore, a woman, temporarily unlawful, is lawful to cohabit with, because her unlawfulness is capable of being removed, then that is lawful which the Koran has laid down to be unlawful. This result must necessarily follow when a marriage, with a *muhul* or subject, which is not fit at the time of the marriage, is said to be *Fasid*; because the term *Fasid* implies lawfulness with defect or vice: the term means that there is the quality of goodness of the essence or *Hussun-lai-Ayn*, but there is also the quality of badness or *Koobuh* by reason of the badness of a *Wusf* or quality.

29. It must be remarked here that to base the distinction of marriage between *Batil* and *Fasid* upon the permanent and temporary character of the unlawfulness of the woman involves a confusion of ideas. Such unlawfulness might be of a temporary character and still the *Nikah* might be *Batil*. *Batil* and *Fasid*, when applied to marriage, are the classes of the notion expressed by the word "marriage," and they do not constitute a classification of the subject or *muhul* of marriage, which subject or *muhul* is the particular woman concerned, and do not depend on the degree of the unlawfulness of that woman, and cannot be determined by a reference to the question whether the unlawfulness of the *muhul* or subject is permanent or temporary, but must be determined by the vice or defect which applies directly and specially to the marriage itself, though that vice or defect might be partially constituted by a reflection of the defect of the subject or *muhul* of the marriage. If the

muhul is not *hulal*, then there is no ownership at all. Connexion with a woman without ownership of marriage or ownership of possession is unlawful in its very essence, whether the woman is permanently unlawful or temporarily unlawful. To argue that because a woman is not unlawful in her essence but is unlawful for something else, therefore her marriage also does not involve unlawfulness of the essence of the marriage, but involves unlawfulness of the marriage on account of a quality of the marriage, is to take two false steps in logic: this argument first assumes one question, and then mixes up that question with another: it assumes that marriage is susceptible of the division of being unlawful in its essence and of being unlawful for something else, for which there is no authority; and it also assumes without any authority that the division of marriage follows the classification of unlawfulness regarding the subject of marriage. (See paragraphs 23, 26 and 74 of this Appendix). It must also be noted that the *Ghyr* or something else does not always prevent the *Koobuh* from being fastened to and induced on the essence. As will be shown in paragraph 81 where the *Ghyr* is *Wasta-fil-sooboot*, there the *Koobuh* or badness is induced in the essence, as in the case of usurpation or *ghusub*, which is bad on account of the right of others; but the *wasta* or intermediary is disregarded, and the *Koobuh* or badness comes to be attached to the essence of the act of usurpation. And besides this, even if the *Ghyr* is of the nature of *Wasta-fil-oorooz*, or bad on account of a quality, still the *Koobuh* might be of such a strong character as to have a preponderating effect, and to overpower the *Hoosn* or excellence, so that the result is *bootlan* or avoidance.

30. The Koran, in declaring unlawfulness, treats of permanent and temporary unlawfulness in like terms; that is, the same terms are used in reference to both. As regards temporary unlawfulness, three instances are given;—the first instance is the case of an idolator; the second is that of two sisters; the third is that of another man's wife, or *Munkooha-i-ghyr*. (See paragraphs 16 and 17 of this Appendix). As regards an infidel woman she is absolutely not a fit subject or *muhul;* and, therefore, the

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(XXI).—See Rudd-ool-Mohtar, Vol. II, page 574. Translated in I. L. R., 23 Calcutta Series, page 165. See also Bailie's Digest, page 399.

See Contra, Mr. Justice Ameer Ali's Mohamedan Law, Vol. II, pages 202 and 317-18.

(XXII).—See Bailie's Digest, page 399, and Rudd-ool-Mohtar, Vol. II, pages 574-75. Translated in I. L. R., 23 Calcutta Series, pages 166, 3rd paragraph.

See also these Tagore Lectures, Vol. III, page 365, paragraph marked (XV).

author of the Rudd-ool Moohtar, reviewing all authorities, lays down that such a marriage is *Batil*, and *Nusub* is not established by it (XXI.) As regards another's wife, she is likewise no *muhul* of marriage (XXII.)

31. The fitness of a particular woman to be a *muhul* is a relative fitness and not an absolute fitness; and the same woman may be a fit subject in respect to one individual and not be so in respect to another; and the question of fitness must be determined by authority, and the chief authority is the Koran. Take the case of a woman, who has been divorced by a *bain* or irreversible divorce by her husband once, twice or thrice; in the first two cases, that is, where the third divorce is not pronounced, she does not cease to be a fit subject of marriage by the same husband; on the other hand, he is at liberty to marry her before the expiry of the *Iddut* and also after the expiry of the *Iddut:* but when the husband has pronounced three divorces, the aid of the *Mohullil* must be invoked and the woman must be married to another man, and the new husband must have intercourse with her, before she can become qualified and fit for re-marriage by her first husband. The Koran says (XXIII) "but if the husband divorce her a third time, she shall not be lawful for him again until she marry another husband." She is, accordingly, classed (XXIV) in *Shoobha-i-fail* which, as will be hereafter explained, is a class where the intercourse is *Batil*, and where *Nusub* is not established. But the same thrice divorced wife is a perfectly fit subject of marriage by a stranger, whose marriage with her whilst she is within her *Iddut* is merely *Fasid*, she being, to all purposes, a fit subject with reference to him.

32. The position of the thrice divorced wife is also illustrated by a rule of Jurisprudence or *Oosool-i-Fikah*. God lays down in the Koran (XXV), "The women who are divorced shall wait concerning themselves until *they have their courses thrice, &c.*" The original word for "courses" is "*Kooroo,*" a word which has a double signification, and which is *Mooshturuk* or common to both purity or *Toohur*, and pollutionor *Hyz*. The Shafei school, for reasons which it is not at present necessary to go into, affirm that *Kooroo* here is used in the sense of *Toohur* or purity: the school of Aboo Haneefa maintain that *Kooroo* here means pollution or *Hyz*; because say they, if it means period of purity, then the word "thrice" or "three," which is a *khas*

(XXIII).—See these Tagore Lectures, Vol. I, page 9, paragraph 58 (54).

(XXIV).—See Hamilton's Hedaya, Vol. II, page 20: and Rudd-ool-Mohtar, Vol. III, page 234, translated in I. L. R., 23 Calcutta Series, page 168.

(XXV).—See these Tagore Lectures, Vol. I, page 9, paragraph 56 (52).

or particular word as contradistinguished from a general or *aam* word, and which governs the word *Kooroo* in the text of the Koran, and which must be conclusive or *kutaie* in its meaning, does not remain conclusive, because the divorce having been given in a period of purity, what remains of that period of purity is not an entire period; and, therefore, if that period is to be counted, the result would be, that there would be only two periods of purity and a fraction of one period of purity; on the other hand, if the period of purity in which the divorce is given is not counted, then the result would be that there would be three periods of purity and a fraction of one period of purity. But if the word *Kooroo* be taken to mean pollution, then the divorce having been given in a period of purity, the wife has simply to count three periods of pollution in future, and her *Iddut* expires with the expiry of the third period of actual impurity (XXVI). Upon this subject there are several riders or rules deduced, which are noticed in the Fusool, a commentary on the Oosool-i-Shashy (XXVII), but it is only necessary here to notice one rule, *viz.*, "It is *Saheeh* or valid for her to contract *Nikah* with a man different from her husband in the third *Hyz* (that is, while the third menses is actually on her and before she has completed that menses) according to Shafei; (because her *Iddut*, according to him, expired with the third period of purity, that is to say, immediately before the third menses commenced) but such a *Nikah* is *Batil* or void according to us. (Here *Batil* is used for *Fasid*, and the *Nikah* is *Fasid* because the *Iddut* has not expired)."

33. Again, the Koran (XXVIII) lays down that four women are lawful as wives at one and the same time; the fifth wife is, therefore, not the *muhul* of *Nikah*, and her marriage must be *Batil;* but if the husband has divorced one of the four by a *bain* or irreversible divorce, and she is observing her *Iddut*, then his marriage with a fifth wife before the expiry of the *Iddut* of the fourth wife, would only be *Fasid*; because, on account of the divorce of one of the four, the relationship of husband and wife has, for all practical purposes, come to an end, so that he can have no intercourse with her, but the non-expiry of the *Iddut* of the fourth wife, which is the period of waiting or probation, raises a defect not of a character to render the fifth wife wanting in fitness, but the defect is of a mere formal character.

(XXVI).—See Tawzeeh, pages 36-37.

(XXVII).—See Foosool, page 22, Delhi edition of 1302 H.

(XXVIII).—See these Tagore Lectures, Volume I, page 16, paragraph 101 (97).

34. So also as regards the *Motudda* of another, that is, a woman who is observing her *Iddut* having been divorced by her husband: she becomes a stranger to her husband as shewn above; she, therefore, acquires the capacity of being a fit subject of marriage by another man, but the marriage shall be *Fasid* and not *Batil*.

35. The author of the Rudd-ool-Moohtar, (XXIX), gives the following instances of a *Fasid* marriage:—marriage with a woman in the *Iddut* of a previous husband; marriage with a fifth wife in the *Iddut* of the fourth; marriage with a female slave upon a free woman. The prohibition in the last case is not based upon a rule of the Koran declaring its unlawfulness, but is based on a tradition of the Prophet, reported in the Dar Kootni to the effect (لا تنكح الامة على الحرة) that "a slave girl ought not to be married upon a free woman:" here the Hanifites maintain that the marriage is not *jaiz* or permissible; but the followers of Malik say, the marriage is good if the free woman agrees; and Shafei says if the husband is himself a slave and has married a free woman with his master's consent, then he can marry a slave girl upon that free woman, who has tolerated the disgrace of being married to a slave, and may, therefore, submit to a little further degradation. The marriage of the slave upon a free woman is, therefore, *Fasid*, which is defined by some of the Doctors (XXX) to be a marriage where the *muhul* or subject is fit, but where there is a difference of opinion among the *Ooleemas* as regards the marriage being permissible or not, *e. g.*, marriage without witnesses. Therefore, here, that is, in the case of a slave girl married upon a free woman, the prohibition arises out of respect for the wife who is a free woman, and not because the slave girl is not a fit subject.

36. The instances given above shew that permanency of unlawfulness or the temporary character of it, as respects the woman, is no ground of distinction to mark the character of the marriage; and that marriages in which the woman is only temporarily unlawful may be equally void with marriages in which the woman is permanently unlawful.

37. As regards the marriage of two sisters, there are two points of view from which the case might be considered; first, when they have been married together, that is, by one contract; and secondly, when they have been married one after the other by separate contracts.

(XXIX).—See Rudd-ool-Mohtar, Volume II, page 574, translated in I. L. R., 23 Calcutta Series, page 165.

(XXX).—See Rudd-ool-Mohtar, Volume II, page 1000, translated in these Tagore Lectures, Vol. III, page 365, paragraph marked (XV).

38. When they are married together, their marriage has been regarded by a small minority as *Fasid*, but generally such a marriage has been held to be *Batil*; and probably the correct view is that it is *Batil* (XXXI). The author of the Buhur-ool Raik (XXXII) holds the marriage of two sisters by one contract to be *Fasid;* as also the marriage of one sister during the *Iddut* of another.

39. Those who hold that the marriage of two sisters by one contract is void or *Batil* rely upon the words of the Koran which, by prohibiting the joining together of two sisters in marriage, lays down the absence of fitness in the subject or *muhul*. Those who hold such a marriage to be *Fasid* probably argue thus; each of the sisters taken by herself without regard to the other, is a fit subject, and it cannot be said, with reference to either, that she was posterior and not prior; therefore each taken by herself alone does not fall within the prohibition against joining two sisters, but falls under the general class of women not declared unlawful by the Koran; but each taken along with the other comes within the prohibition against joining two sisters in marriage as laid down in the Koran: therefore the case has a double aspect, and both aspects might be given effect to: each being a fit subject by one process of reasoning, the marriage is not void, and, therefore, *Nusub* would be established, and *Iddut* would be obligatory; but each being regarded along with the other, the marriage is bad, and, therefore, there should be separation between them and the husband. I have not seen this process of reasoning laid down distinctly in reference to the case in question, but I infer as much from the discussion in Jurisprudence regarding the effect of an exception or *istisna*, and abrogation or *Nuskh*, and particularisation or *Tukhsees*, as relating to a case of sale, where two things are sold by one contract with the option in the seller as to one of those things, in which case one analogy requires that the sale should be good in all cases, and another analogy requires that the sale should be bad in all cases; but giving effect to both the analogies, the sale is held good only if the subject of option is known and its price is also known, and it is held bad in three other cases, the alternatives being four (XXXIII).

(XXXI).—See Aynee, Volume II, page 31.
Inaya, Volume II, page 10.
Futh-ool-Kudeer, Volume II, page 19.

(XXXII).—See Rudd-ool-Mohtar, Volume II, page 999, translated in these Tagore Lectures, Vol. III, pages 362-63, paragraph marked (VI), where the quotation from the Bahur-ool-Raik is given.

(XXXIII).—See Towzee, pages 51-53.

40. But where two sisters are married one after the other, there, by no possibility, can the sister married subsequently be deemed to be a fit subject, and nobody has discovered any process of reasoning consistent with the rules of Jurisprudence to take the second marriage out of the category of a void or *Batil* marriage; accordingly, Text-writers and Commentators have held such a marriage to be *Batil* (XXXIV).

41. If the woman is a fit subject, and the marriage is, in all respects, *Saheeh* or valid, then the marriage itself amounts to intercourse by fiction (or *Wuty-i-Hookmy*); so that if birth takes place at six months from the marriage, the *Nusub* is established, although actual intercourse might have taken place later, or might be impossible to human comprehension and perception; as where the husband is *Mujboob* (one whose male organ has been cut off) or where the husband is in the east and the wife is in the west. In a *Saheeh Nikah* two things are found at once; first, the subject or *muhul* is fit or *Saleh*; and second, by the *Nikah* that *muhul* becomes *Hulal* by reason of the fulfilment of all essentials.

42. In a *Fasid* marriage the *muhul* is *Saleh* or fit; that is, the woman has the capacity or fitness to become a wife, but the *muhul* does not become *Hulal* or lawful on account of some defect; and by reason of this defect, the marriage does not amount to a constructive intercourse or *Wuty i-Hookmy*, and *separation is, therefore, necessary to prevent sinfulness*, [as shown in the Rudd-ool-Mohtar, Vol. II, page 468, referred to in the citation to paragraph 40 of this Appendix, and translated in I. L. R., 23 Calcutta Series, page 163, paragraph marked (*c*)]; but the *muhul* being *Saleh*, or fit, *Nusub* would be established if birth takes place at six months from actual intercourse.

(XXXIV).—See Hamilton's Hedaya, Volume I, pages 78 and 79.

Aynee, Volume II, page 31.

Inaya, Volume II, page 10.

Fath-ool-Kudeer, Volume II, page 19.

Rudd-ool-Moohtar, Volume II, pages 574 and 575, translated in I. L. R., 23, Calcutta Series, pages 165, 166 and 167, also referred to shortly in Mr. Justice Ameer Ali's Mohamedan Law, Volume II, page 319, but the full and correct translation of the whole of the passage is given in the Report.

Rudd-ool-Moohtar, Volume II, pages 465, 468, 469 and 471, translated in I. L. R., 23, Calcutta Series, pages 162, 163, 164 and 165; that is to say, page 465 is translated at page 162, paragraph (*a*); page 468 is translated at page 162, paragraph (*b*) and at page 163, paragraphs (*c*), (*d*) and (*e*); page 469 is translated at page 164, paragraph (*f*); page 471 is translated at page 164 paragraphs (*g*) and (*h*).

43. But in a *Batil* marriage, the *muhul* or subject is not fit; there is, therefore, no marriage at all; and because there is no marriage, the parties must be separated; and because the *muhul* is not fit, there is no *Nusub*; whereas in a *Saheeh* marriage, the *muhul* is fit, and the woman becomes lawful to be enjoyed; because she is lawful to be enjoyed, she cannot be separated; and because the *muhul* is fit, therefore *Nusub* is established.

44. It thus appears that the establishment of *Nusub* depends on the fitness of the subject or *muhul;* and that the fitness of the *muhul* gives to the marriage the character of being *Saheeh* or of being *Fasid;* and that, among other things, absence of fitness gives to it the character of *Bootlan* or being void.

45. In the annotations on the Foosool, which is a Commentary on the Oosool-i-Shashee, a passage is cited at page 185 in note I from the Madun, which is also a Commentary of great authority on the Oosool-i-Shashee, the effect of which is as follows:—Where there has been *Eejab* and *Kabool* without witnesses, there is no *Nikah* according to the Shera: and the establishment of *Nusub*, and the absence or *Sakoot* of *Hudd*, and the obligation of *Iddut* do not indicate the lawfulness of the *Nikah;* because these things are established as based on *Shoobha-i-Akd* or doubt arising from marriage, *on account of the existence of the pillar of the contract*, (which is *Eejab* and *Kabool*) *emanating from an Ahul or fit subject, towards a muhul or fit object.*

46. Thus, as shown above, in a *Batil* marriage the subject or *muhul* is not fit. Accordingly the Tulweeh, a Commentary on the Tawzeeh, (XXXV) whilst distinguishing between *nuhee* or negative commands and *Nuskh* or abrogation, lays down that the latter "declares that the act can no longer possibly exist according to the *Shera*, *e.g.*, to face towards Jerusalem in prayers, and the lawfulness of two sisters" (literally "sisters.") Here "sisters," evidently means "two or more sisters" that is sisters of the wife, although the word might also include one's own sisters. The lawfulness of a man's own sister was allowed in the religion of Adam, but it was abrogated long before the advent of our Prophet. The lawfulness of the wife's sister existed before the time of our Prophet. It existed in the law of Moses, who himself married two sisters, who were the daughters of Shoaib. Before the time of Moses, instances of lawful marriage of two sisters existed. Yakoob or Jacob had married two sisters, and Yusoof or Joseph was born of one of them. But all this was made *nuskh* or

(XXXV).—See the Tulweeh, Newal Kishore's Edition of Lucknow, page 291.

abrogated by the law promulgated by our Prophet. The practice of facing Jerusalem whilst saying prayers was abrogated by the Koran (XXXVI), which laid down that the face must be turned towards Mecca whilst saying prayers, and, therefore, the practice of facing Jerusalem whilst saying prayers is absolutely prohibited by the abrogation in question, and therefore, to say one's prayers facing Jerusalem is not to bring the prayers into existence, and such prayers amount to no prayers at all. So the practice of joining two sisters, which existed before, was abrogated by the text of the Koran already cited, and, therefore, according to the *Shera*, the joining of two sisters together in marriage cannot be recognised, and a marriage, in which two sisters are joined, has no existence according to the *Shera*, just as if no outward form of marriage had at all been gone through; and although there might be proposal and acceptance in appearance, still such marriage is not thereby brought into existence according to the *Shera*, and, therefore, the effect of a valid marriage prescribed by the *Shera* does not attach itself to such a marriage; because the effect would come into existence after the existence of the cause, which is marriage; and inasmuch as there is no existence of marriage, there can be no *Iddut* and no *Nusub*, which are, generally speaking, some of the results of a marriage, which comes into existence according to the *Shera*: the marriage in question is, therefore, absolutely void.

47. But a *Fasid* marriage, strictly speaking, would be one in reference to which there is no text, which abrogates and renders void the very essence of the thing, but it must be one in which there is a negative command or *nuhee*, which legalises the essence, and renders the act as possible of existence under the *Shera*, but prohibits it on account of some flaw or defect.

48. From what I have submitted above, it will appear that intention has no effect or relevancy in a question of marriage; and it will also appear why a marriage, even by way of a *joke* or *huzul*, becomes a binding marriage, provided the subject is fit and the other essentials are not wanting.

49. A just and proper appreciation of the question as to the fitness of the subject or *muhul* affords, generally speaking for all practical purposes, a key for the solution of most of the rules relating to the law of marriage in connection with the question raised, and negatives the supposition that the portion of the law, relating to crimes and to punishments

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(XXXVI).—See these Tagore Lectures, Volume I, page 3, paragraph 14 (10).

for *zina* or whoredom, and for *kuzuf* or slander, supports the position that where the subject is permanently unlawful, there the marriage amounts to no marriage, and does not conduce to *Nusub*, but where it is temporarily unlawful, there the marriage is a good marriage and establishes *Nusub*.

50. The general principle which underlies the law of punishments for crimes is the tradition of the Prophet—"Drop punishment from doubt," the punishment for *zina* being exceptionally severe. Doubt is of two kinds: doubt or error in the act, and doubt or error in the subject; (XXXVII). Both these doubts are sufficient to do away with punishment. In both these classes of doubts there is express authority for unlawfulness. In *Shoobha-i-fail*, or doubt or error in the act, there is no sort of authority for the lawfulness of the *muhul* or subject, *e.g.*, the son having intercourse with the father's slave girl; but still when the man claims doubt, that claim has been considered sufficient to remove liability to punishment; but in this class *Nusub* is not established on account of the absence of all authority for the lawfulness of the subject. But in *Shoobha-i-muhul*, or doubt or error in the subject, there is some sort of authority for the lawfulness of the subject, *e.g.*, the father having intercourse with the son's slave girl; here the authority for unlawfulness is the authority that a man cannot enjoy any but his own slave girl, and cannot appropriate another's property; but there is another authority which the father has or might have misapplied, and that authority consists in the tradition that the son and all that belongs to the son belong to the father; the latter, therefore, has misapplied this authority in reference to the son's slave girl. (See paragraph 60). Here also, on account of doubt, the punishment ceases or drops, and on account of the authority for the lawfulness of the subject, *Nusub* is established. See the instances cited in the Hedaya under the respective heads of *Shoobha-i-fail* and *Shoobha-i-muhul*, which instances are amplified but under the same underlying principle in the Rudd-ool Mohtar (XXXVIII).

51. In common with other matters relating to the *Shera* in which there is misconception, *Hudd* is a word regarding the meaning of which

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(XXXVII).—See Hamilton's Hedaya, Volume II, pages 19, 20 and 21.

(XXXVIII).—See Rudd-ool-Mohtar Volume III, pages 231 and 234, translated in I. L. R., 23, Calcutta Series, pages 167 and 168.

See also Baillie's Digest of the Mohamedan Law, pages 397 and 398.

there is some misconception. Correctly speaking, *Hudd* is punishment prescribed unalterably by the Koran for unlawful connexion falling under the definition of *zina:* and the *Tazeer* or penalty which, according to Aboo Haneefa, is to be substituted for *Hudd*, where the case does not fall within the technical definition of *zina*, is a discretionary punishment, the nature of which is not unalterably fixed. The *Hudd* for *zina* is fixed by the Koran itself. In a case of *zina*, the Kazee has no alternative: he must carry out the sentence to the fullest extent, and the fixed number of stripes or *doorras* must be laid on even if the culprit were to succumb to death during the infliction. It is related of Huzrut Oomur (see Tareekh-i-Khumees, Volume II, page 252) that having convicted his only son Aboo Shahma of *zina*, he had the strength of mind to do stern justice by passing a sentence that the culprit should receive the fixed number of *doorras*, and although life was nearly extinct even before the last few stripes had been inflicted, still the Shera must have its strict course and the full number was ordered to be completed, so that with the last stripe life became wholly extinct. No ordinary man or woman is believed to survive the punishment for *zina*, although, no doubt, to suffer the punishment is to make full atonement for the transgression. For cases which did not amount to *zina* but which were withal illegal connexions, Aboo Haneefa substituted *Tazeer*, which, though not so severe as the *Hudd* fixed by the Koran, was severe enough in all conscience, and was not and could not be said to consist of a mild chastisement.

52. The following proposition is true: the *Shoobha*, which is sufficient to establish *Nusub* is also sufficient to remove the liability to *Hudd:* but the *Shoobha*, which is sufficient to remove the liability to *Hudd*, is, by no means, necessarily sufficient to establish *Nusub*.

53. In every case where, although a form of marriage has been gone through, still there is some kind of flaw in it, it must be seen whether the case is that of *Shoobha-i-fail* or *Shoobha-i-muhul:* in the latter case, generally speaking, *Nusub* is established, but not in the former: in both cases the mere form of marriage being gone through does not render the *muhul*, at the time of the marriage, *hulal*, and it is a different question whether or not it is capable of becoming *hulal* in future by a future marriage. Nothing can be more repugnant to the instincts of the Mohamedan Law than the proposition that consummation cures a flaw or defect: that consummation should have the effect of curing or removing a

flaw is a non-Mohamedan idea :* the consummation itself, that is, a legal consummation, is the effect of a cause; that cause is the establishment and existence of ownership; if the cause is absent, the effect must be absent; therefore consummation itself must, in order to be legal, take place in a valid marriage. (See paragraphs 13 and 68 of this Appendix): and besides this, if in *Fasid* marriages consummation had that effect, then why should it be the duty of the Kazee to separate the parties on the fact coming to his knowledge. (See paragraph 42 of this Appendix.)

54. In a *Suheeh* or valid *Nikah*, (firstly), the *Nikah* itself creates liability to dower; (secondly), the *Nikah* is *Wuty-i-Hookmy*, or sexual intercourse by fiction; so that if birth takes place within six months from the marriage, the *Nusub* is established, although the birth might not be within six months of actual *Wuty;* (thirdly), the *Nikah* is susceptible of divorce or the breaking or dissolution of the link or vinculum brought into existence by the marriage; (fourthly), as soon as there is a *Khilwut-i-Suheeh*, the *Iddut* becomes obligatory; (fifthly), dower becomes *lazim* or obligatory by mere marriage, but becomes payable by *Khilwut-i-Suheeh;* in other words, *Nufs-i-Wujoob* or mere liability to dower becomes established by *Nikah*, but *Wujoob-i-Ada*, or obligation to payment, is established by *Khilwut-i-Suheeh*, or by death; (sixthly), in a *Suheeh* marriage *Lian* may take place. But in a *Fasid Nikah*, (firstly), it is sexual intercourse and not the *Nikah* itself which creates liability to dower; (secondly), the *nikah* is not *Wuty-i-Hookmy*, but there must be actual sexual intercourse; so that if a child is born within six months of actual sexual intercouse, then the *Nusub* of that child is established; (thirdly), the Kazee must separate the parties, and the separation is *Fuskh* or cancellation, and not *Talak* or dissolution; (fourthly), the *Khilwut-i-Suheeh* does not give rise to *Iddut*, but the *Iddut* arises from actual *Wuty*, or sexual intercourse, as a matter of precaution; (fifthly), the dower does not become obligatory and payable except by actual sexual intercourse, and not even by death; and it is correct to say that *Khilwut-i-Fasid* in *Nikah-i-Suheeh* is like *Khilwut i-Suheeh* in *Nikah-i-*

* Even in matters of *Koofawut* or *Equality*, where the *muhul* or subject cannot be said to be not fit in the sense in which the word is used in the case under discussion, consummation does not cure the flaw of want of *Equality*. See these Tagore Lectures, Volume, II, page 76, paragraph 1101 (201) and page 78, paragraph 1105 (205). The birth of a child, however, in the case of absence of *Koofawut*, destroys the right of objection. See these Tagore Lectures, page 77, paragraph 1102 (202), and page 86, paragraph 1126 (226); and as regards *Nusub* in the case of absence of *Equality*, where intercourse has taken place and a child is born, there is no difficulty in the *Nusub* being established in the father, because there the woman or the *muhul*, that is, the subject, is fit. This matter has an important bearing on the question under discussion.

Fasid; (sixthly), in a *Fasid* marriage *Lian* does not take place: and this should be sufficient to bring the error home to those who hold that, in a *Fasid* or an invalid marriage after consummation, the flaw is removed; on the contrary, the flaw sticks to it throughout, because one of the forms of *Lian* is applicable only after consummation and pregnancy; but it is an established rule that no *Lian* can ever apply to an invalid marriage; whereas, if the adverse argument had been correct, and if after consummation, the *Fasid* marriage was capable of being converted into and treated as a *Suheeh* marriage, then it would follow that *Lian* would apply after pregnancy to an invalid or *Fasid* marriage (XXXIX).

55. The reason why in *Shoobha-i-fail* or "doubt in the act" the *Nusub* is absent is thus stated in Note 3 to the annotations on the Foosool (XL). As a consequence of the doubt, the *Hudd* is dropped or becomes *sakit*, but this doubt is not sufficient to establish *Nusub*; "because the establishment of *Nusub* depends on the existence, however small, of ownership (as in the case of a slave girl) in the *muhul*, or on the existence of lawfulness (as in the case of a marriage) in that *muhul*, and neither of these is found"*

56. There is another quotation from note 10 of the annotations on the Foosool, which may be cited here with advantage. At page 189 of that work a question is raised regarding the meaning of the word "daughter" in the Koran, where there is an enumeration of women whom it is prohibited to marry (XLI). Does the word "daughter" include a daughter by *zina?* If she is included, then does not this amount to an authority for the establishment of her *Nusub* in the *Zanee?* The answer is, that the word "daughter" in the Koran includes both a daughter by lawful intercourse and a daughter by unlawful or illicit intercourse; but that, in the latter case, the *Nusub* is not established in the father: because the establishment of *Nusub*, according to the *Shera*, requires that there should be an antecedent cause or *subub* such as *Nikah* or marriage, and *milk* or ownership; and the fact of her being, in reality, his daughter is a different question, and depends upon *Joozeeut* and *Bazeeut* in fact; that is, it requires that there should exist in the daughter

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(XXXIX).—See these Tagore Lectures, Volume III, page 352.

(XL).—See Foosool, page 288.

* لان ثبوت النسب يعتمد قيام الملك في المحل من وجه او قيام المحل فيه ولم يوجد -

(XLI).—See these Tagore Lectures, Volume I, page 18, paragraph 119 (115.)

particles and fractions of the father; therefore, the negativing of the one (*i.e.*, the *Nusub*) does not involve the negativing of the other (*i.e.*, the fact of her being the daughter); that is to say, if you negative her *Nusub* from him, you do not negative the fact of her being his daughter naturally. *Kyas* requires that her *Nusub* should be established from the *Zanee*, but the *Nusub* is not established in the *Zanee* on account of a tradition of the Prophet* to the effect "that the *wulud*, or child, is for the *Firash*, (that is, for the owner of the *Firash*), and for the adulterer there is prohibition:" thus the Prophet himself negatived the *Nusub* from the *Zanee*. Then, if it be objected that this tradition is of the class called *Ahad* or traditions reported scantily, that is, by a small number of persons both in the beginning and afterwards (as contradistinguished from traditions called the Mutwatir, that is, those traditions which are numerously reported, and are therefore of sufficient authority and weight to act on, even when opposed to the Koran itself) and, therefore, cannot be acted on in opposition to the text of the Koran relating to "daughters," (that is to say, if it be objected to that this very text of the Koran, which prohibits one from marrying "your daughters," is sufficient to establish her *Nusub* from the father, without the text being outweighed by a tradition of the *Ahad* class), the answer to this argument is that (*Izafut-i-Mootlak* or) a general reference (such as is involved in the expression "your daughters") does not necessarily involve the establishment of *Nusub*; dost thou not see that a child is referred to the mother when God says, "the mothers or *walidat* shall give suck to *their* children or *aulad*" (XLII); and there is a concurrence of authority or *ijma*, that this expression does not establish the *Nusub* (of the children in the mothers—*Nusub* being referable to males only; and, therefore, a *wulud-ool zina* being a child, whose mother might be known, but whose father is not known, is a *Mujhool-ool-nusub*). It is, therefore, clear that there is no conflict between the text of the Koran (in the matter of the *Nusub* by the force of the expression "Your daughters," and between the tradition of the Prophet cited above). This is laid down in the work called the Madan. It can also be assigned by way of an answer that *Nusub* is not established from the *Zanee* both so far as the Kazee is concerned and also morally speaking; because the reality of *Nusub* is known only to God; and for this reason all mankind shall, on the day of judgment, be referred to their mothers; because if

* الولد للفراش اى لصاحبة و للعاهر الحجر -

(XLII).—See these Tagore Lectures, Volume I, page 10, paragraph 61 (57.)

they were to be referred to their fathers, then the shame of a large number would transpire, and it would be impossible that Adam and Christ could be called out at the day of judgment if the description would require reference to the fathers.

57. The Bahur-ool Raik (XLIII), lays down that *Nusub* is established in *Shoobha-i-muhul* if there has been a *Daiwat* or claim on the part of the man, and that *Nusub* is not established in *Shoobha-i-fail* even if there has been a *Daiwat;* "because in the second case the act amounts to pure *zina* (without any doubt in favor of lawfulness), although the *Hudd* drops on account of something which has reference to the *Zanee,* and that thing consists of its being doubtful to him whether the intercourse was unlawful; but it does not amount to pure *zina* in the first case by reason of doubt in the *muhul.*" *

The author then goes on to shew that in regard to cases of *Shoobha-i-fail,* where the *Nusub* is not established even when there has been a *Daiwat,* there are two exceptions; one is, where a man divorces his wife thrice, and she then, at or more than two years after the three divorces, gives birth to a child, the *Nusub* of that child shall be established in the man, if he makes *Daiwat;* and if she gives birth within two years, then *Nusub* shall be established in the man without a *Daiwat;* the second exception is where a man marries a woman, but a wrong woman is sent to the bridegroom, who has intercourse with her relying on the words and assurances of others; in this case, according to Zailye, *Nusub* shall be established in the bridegroom if there be a *Daiwat.* The first exception, however, deals with the case of *Nusub* arising out of the marriage which had been contracted before the three divorces were given; it is not to be taken as justifying by implication a marriage with the thrice divorced wife, before the assistance of the legaliser or *mohullil* has been invoked.

58. But the class of cases enumerated under the head of *Shoobha-i-muhul* is very far removed from the case under consideration, and bears no resemblance to the case of a sister married subsequently to her sister's marriage: in the latter case the authority for the unlawfulness is express and conclusive.

(XLIII).—See Bahur-ool Raik, Volume V, page 15.

* لان الفعل تمحّض زنا فى الثانية و ان سقط الحد لامر راجع اليه و هو اشتباه الامر عليه ولم يتمحّض فى الاولى للشبهة فى المحل.

59. To the two classes of doubts mentioned above, Aboo Haneefa adds a third, *viz.*, doubt arising from marriage; and, according to him, on account of this doubt also, punishment ceases; but this is not the view of his two disciples, according to whose views Futwa is given. According to Aboo Haneefa all daughters of Eve are generally fit subjects of procreation, and, therefore, marriage even with a *Maharim* is sufficient to give the prisoner the benefit of the doubt. But even according to Aboo Haneefa, when the matter relates to one of *Nusub*, it is, by no means, the concurrent opinion of all, and it is, by no means, universally accepted that Aboo Haneefa's view was that *Nusub* is established by mere marriage without any regard to the fitness of the subject or *muhul* in an individual case (XLIV). But supposing it were to be admitted for the sake of argument that, for some reason or other, Aboo Haneefa did so hold, still that is not the law (XLV). As regards the question of *Nusub* there is no third class of doubt, that is to say, the error or doubt arising from marriage is no substantive and independent class of doubt at all; and accordingly the Hedaya in dividing doubts uses language from which only two classes of doubt result, *viz.*, one where *Nusub* is established, and the other where *Nusub* is not established; because the Hedaya (XLVI) says, "Error is of two kinds, &c.," (XLVII) and "according to Aboo Haneefa, a contract of marriage is a sufficient ground of error, &c." Such is also the view taken by the author of the Rudd-ool Mohtar who (XLVIII), comments on the following words of the Doorr-ool Mooktar—"It thus appears that the classification of doubt into three divisions is according to the view of Aboo Haneefa." The author of the Rudd-ool Mohtar, after citing the above passage, says that the classification of doubt according to *Hookm*, that is, effect—and *Iddut* and *Nusub* are some of the effects—is into two, according to all; at most, the effect of *Shoobha-i-akd*, according to Aboo Haneefa, is the same as that of *Shoobha-i-*

(XLIV).—See Jamai-ool-Rumooz, otherwise called 'the Kohistany,' Volume IV, page 644, translated in I. L. R., 23, Calcutta Series, page 159.

(XLV).—See Hamilton's Hedaya, Volume II, pages 21 and 25.
See Mr. Justice Ameer Ali's Mohamedan Law, Volume II, page 318.

(XLVI).—See Hamilton's Hedaya, Volume II, page 19.

(XLVII).—See Ditto Volume II, page 21. Also see Baillie's Digest of the Mohamedan Law, page 399.

(XLVIII).—See Rudd-ool Moohtar, Volume III, page 238, translated in I. L. R., 23, Calcutta Series, page 173.

muhul; but, according to his two disciples, it has the effect of *Shoobha-i-fail:* if the classification is according to *mufhoom* or meaning of the word *doubt,* then also there are two classes; because some of the cases, which fall within *Shoobha-i-akd,* are *Shoobha-i-fail,* whilst others, which fall within *Shoobha-i-akd,* are *Shoobha-i-muhul;* that is, those cases of *Shoobha-i-akd,* in which as regards the lawfulness of the subject or *muhul* there is some authority, will fall within *Shoobha-i-muhul,* and those in which there is no such authority will fall within *Shoobha-i-fail.*

60. Turning to the Futh-ool Kudeer the same result follows. The division of doubt or *Shoobha* (XLIX), according to the Hanifee and the Shafei schools, is set forth, and it is laid down that in *Shoobha-i-fail Nusub* is not established. It is laid down (L) that *Shoobha-i-akd* is recognised only by the Imam-i-Azum, that is, Aboo Haneefa. It is further laid down (LI) that by intercourse with the slave girl of a son's son, *Nusub* is not established: so also is it not established (LII) by intercourse with the wife's slave girl. *The last two instances should receive special attention for the purpose of being compared with the case where the father has intercourse with the son's slave girl, and where Nusub is established* (see paragraph 50). It is also laid down (LIII) that Futwa is given according to the view of the *Sahibain, i.e.,* Aboo Yusoof and Mahomed in the matter of non-establishment of *Nusub* by the *Nikah* with a *Maharim.*

61. It now remains to deal with one or two passages from Baillie's Mohamedan Law, which is a translation of passages from the Fatawai Alumgiree, the latter being a work extending over six volumes in Arabic. The Fatawai Alumgiree is not a collection of actual decisions by the Kazees, as some people erroneously suppose. There are two methods of writing books on Mohamedan Law; one is to write the work in the form of Jurisprudence laying down general rules without the detail or concrete cases being the primary object of the work, and without writing the work in the form of supposed cases; such as the Tunkeeh and its Commentary (or Shurah) the Tawzeeh, on which there is a further commentary in the form of annotations or Hasheeah called the Tulweeh, which again has several

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(XLIX).—See Futh-ool Kudeer, Volume II, page 588.
(L).—See Ditto Volume II, page 589.
(LI).—See Ditto Volume II, page 591.
(LII).—See Ditto Volume II, page 592.
(LIII).—See Ditto Volume II, page 595.

Hasheeahs one of them being the Chulupy; and such as the Manar, the Noorool Anwar, the Dair-ool-Oosool, the Oosool-i-Shashee, the Hoossamee, the Namee, the Moossullum-oos-Suboot by Moulvie Moohiboolla of Bihar, and its Commentaries written by Mawlana Abdool Ali Buhur-ool Ooloom and by his father Moolla Nizamuddin and by Moolla Moobeen and by Moolla Hussun and by Moulvie Burkutoolla of Allahabad; and such as the Moohkum-ool-Oosool by Hafiz Aman-oolla of Benares; and such as the Buzduwee, the Kashshaf and the Muhsool. These are works on Jurisprudence or Oosool, *i.e.*, root. In these works the four sources of *Fikah* or principles of law are treated in their order, and the author descends from the general to the particular, and illustrates the roots or principles by a reference to the branches or particulars and details, and enunciates the law in the form of principles rather than in the form of rules having for its object practical cases, which ordinarily occur in life. Another method of writing on Mohamedan Law is to go into details and to provide for supposed cases, which occur or are likely to occur in real life, without treating directly of the sources or roots as a whole, and without dealing primarily with those sources; in other words, the object is to write in the form of a digest to provide for supposed cases instead of writing in the form of Jurisprudence and laying down general principles and instead of dealing primarily with the origin of the rules applicable to those cases, although, no doubt, such rules might, by way of elucidation and explanation, be traced to their origin not as the primary object in view but as a matter secondary and subordinate thereto. As instances of such works may be cited the Fatawai Kazee Khan, the Fatawai Imadea, the Fatawa Buruhna, the Fatawai Alumgiree, &c., &c. Such writings are called the *Fooroo* or branches, and they deal with details, and constitute collections of the views of various authors with such light as the compiler or author can throw on the subject by fortifying the rules laid down by a reference to the principles on which the rules are founded. In books on Jurisprudence the main or direct object is to treat of the Oosool or roots, that is, the principles of law; and in works on Fooroo or branches, the main object is to deal with details and cases.

62. As regards what appears in Baillie's Digest at page 32, a reference to the original Arabic of the Futawai Alumgiree (LIV), shows that the authority for the position regarding *Iddut* and *Nusub*, when two sisters are

(LIV).—See original Fatawai Alumgiree, Volume I, pages 391 and 392.

married one after the other, is the work called the Mooheet-i Surukhsy, and the quotation from that work begins with the words "should the sisters be married by separate contracts, the marriage of the last married is invalid, and it is incumbent on the husband, &c.," and ends at the same page in Baillie with the words "the husband being bound to refrain from matrimonial intercourse with his wife, until the expiration of the sister's *Iddut*." The authority for what follows in that paragraph at the same page in Baillie commencing with the words "if he had married the two sisters by separate contracts, &c.," up to the words "but if he fail to explain, he has no choice and must separate from both" is the Shuruh-i-Tuhavee. The authority of the Mooheet-i Surukhsy has been considered by later writers, such as the Rudd-ool Moohtar, the author of which, in the course of his work, makes frequent allusions to the Fatawai Alumgiree under the designation of Fatawai Hind, and to the Mooheet as cited in the Fatawai Hind.

63. The author of the Rudd-ool Moohtar, (LV) has before it that portion of the Fatawai Alumgiree which, in the original, corresponds with page 32 of Baillie's Digest; therefore having before him the whole of the page of the Fatawai Alumgiree, which corresponds with page 32 of Baillie's Digest, he knows and has before him what the Mooheet-i Surukhsy holds and what the Shuruh-i-Tahavee also holds as regards the cases discussed by each respectively; and referring to Shuruh-i-Tahavee he quotes the Shuruh-i-Tahavee from the Fatawai Alumgiree, and approves of it, saying "it is laid down in the Fatawai-i-Hindia from the Shuruh-i-Tahavee that, if the husband married the two sisters by two contracts, &c., &c." As regards the authority of the Mooheet-i Surukhsy, that authority is questioned and dissented from expressly in an analogous case, *viz.*, that of a Moslem marrying an idolatress; in this latter case, the Mooheet's view was that the marriage is *Fasid*, and that there is *Nusub* and *Iddut*: but the author of the Rudd-ool Moohtar (LVI) citing the Mooheet-i Surukhsy upon that question, dissents from it, and distinctly lays down that the marriage is *Batil*, and that there is no *Nusub* or *Iddut*;

(LV).—See Rudd-ool Moohtar, Volume II, page 468, translated in I. L. R. 23, Calcutta Series, page 163.

(LVI).—See Rudd-ool Moohtar, Volume II, page 574, translated in I. L. R. 23, Calcutta Series, page 165, referred to shortly in Mr. Justice Ameer Ali's Mohamedan Law, Vol. II, page 319.

and he then says, "This thou should understand"—a form of expression explained in the introduction to the Rudd-ool Moohtar (LVII) to denote that the author quoted from and referred to is wrong, although out of respect to the memory of the deceased author, a harsh expression is not used. And as regards the rule laid down by the Mooheet-i Surukhsy regarding the marriages of two sisters married one after the other, as in Baillie's Digest, page 32, the Rudd-ool Moohtar, in spite of the Mooheet-i Surukhsy, and with the knowledge of Mooheet's view on the subject, has laid down a different rule, without taking the trouble of noticing the Mooheet; the rule laid down by the Rudd-ool Moohtar being that the marriage of the first sister is valid or *Suheeh*, and the subsequent marriage of the second sister is void (LVIII). The authority of the Mooheet, therefore, goes for very little or nothing. It cannot have weight superior to that of Aboo Haneefa, and even his view is not the law as correctly understood and actually declared and applied.

64. There is a passage in the Inaya (LIX) which is supposed to favor

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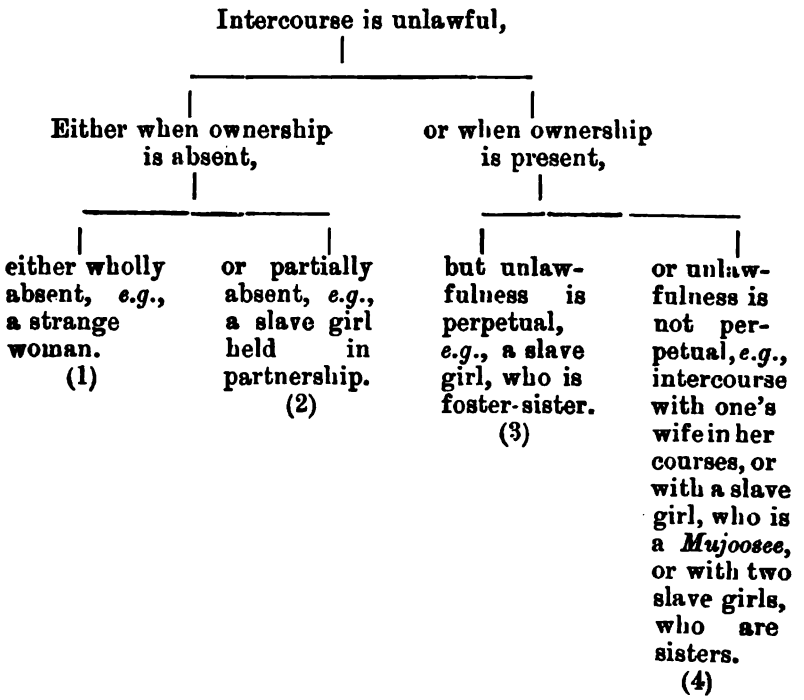
(LVII).—See Rudd-ool Moohtar, Volume I, page 3, lines 6 to 8.

(LVIII).—See Rudd-ool Moohtar, Volume II, pages 465, 468, 469, 471 and 574. The first four references, are translated in I. L. R. 23, Calcutta Series, pages 162, 163, 164 and 165. The last reference is translated in I. L. R. 23, Calcutta Series, page 167, 3rd line from the top, and is summarily referred to with different effect and meaning in Mr. Justice Ameer Ali's Mohamedan Law, Vol. II, page 319.

(LIX).—See Inaya, Volume II, page 496, translated in I. L. R. 23, Calcutta Series, page 156, where the whole of the passage from the Inaya is translated without a break. See Baillie's Digest, pages 152-153, where mere portions of the Inaya are translated, and the translations are so interspersed and mixed up with quotations from and references to the Hedaya and with Mr. Baillie's own views and inferences on the subject, that the effect of the passage from the Inaya is altogether lost sight of, so that Mr. Baillie's own views and inferences are apt to be mistaken for translations from the Inaya. For instance,—the passage at page 153 of Baillie's Digest, eighth line, beginning with the words, "With regard to women who cannot be lawfully joined together" and ending with the words, "and, therefore, the connexion is not *zina*," is not to be found in the Inaya at all—and the reference given by Baillie at foot marked No. 3 "Inaya, Volume II, page 496" must be taken to be a reference to the authority for the justification of an inference drawn by Mr. Baillie himself from some language used in the authority referred to. It is, however, conclusively shown here in this appendix and in the full translation given in the Reports that Mr. Baillie's inference has absolutely no foundation in the authority. See also Mr. Justice Ameer Ali's Mohamedan Law, Volume II, chapter 7, page 317, where the matter has been left in the same state as in Baillie's Digest.

the adverse view. That passage is a commentary on the Hedaya (LX) relating to the Chapter on Punishment for *Kuzuf* or slander. The Hedaya says, "If a man have unlawful commerce with a woman in whom he has no right of co-habitation, &c.:" then follows the commentary. The Commentary has nothing to do with the present question; and, if at all, it favors the view that the subject or *muhul* should be fit.

65. The Inaya in the passage above quoted classifies unlawful (or *Huram*) intercourse as follows:—


Intercourse is unlawful,
Either when ownership is absent,
or when ownership is present,
either wholly absent, e.g., a strange woman. (1)
or partially absent, e.g., a slave girl held in partnership. (2)
but unlawfulness is perpetual, e.g., a slave girl, who is foster-sister. (3)
or unlawfulness is not perpetual, e.g., intercourse with one's wife in her courses, or with a slave girl, who is a Mujoosee, or with two slave girls, who are sisters. (4)

66. In cases (1), (2) and (3), the intercourse is unlawful in its very essence, and, therefore, such intercourse amounts to *Zina*, and the slanderer is subjected to no *Huld*, inasmuch as he spoke the truth: in case (4) the intercourse is unlawful not for its essence but for something else, that is, for something different from the essence, that is, for a *Moojawir* or attendant or concomitant circumstance, which does not permanently subsist, and such intercourse therefore is not *Zina*, and, therefore, the slanderer spoke falsely in this case, and, consequently, he must be subjected to *Hudd*.

(LX).—See Hamilton's Hedaya, Volume II, page 69.

67. But there is a wide gulf and a long and big jump between the proposition that class (4) is not *Zina* and the proposition that the subsequent marriage of a second sister is *Fasid*, and that intercourse with such second sister after such marriage is not *Zina*. Class (4) does not amount to *Zina, not merely because the unlawfulness is for something else, but because there is* undoubted legal *ownership* present, and you cannot imagine a case in which intercourse is unlawful *for something else* unless there is ownership either arising from marriage or from what the law deems slavery; because if there is no ownership, the intercourse is unlawful in its essence; and if there is ownership, and if the subject is not perpetually unlawful, then the intercourse cannot be unlawful in its essence, but must be unlawful for something else: in cases in which the subject is not perpetually unlawful, the ownership makes the essence of the subject lawful, and unlawfulness, if at all, must arise from some accidental or concomitant circumstance or *Moojawir;* and, therefore, it can be laid down broadly that where there is ownership of marriage, there is no *Zina;* and where there is ownership of possession, there the intercourse is not *Zina*, provided there is no perpetual prohibition, the ownership plus absence of perpetual unlawfulness having the effect of preventing the intercourse from amounting to *Zina;* but there must be ownership such as the law recognizes, and there must not be only an illusory ownership or a mere seeming or apparent but unreal ownership; where, for instance, the sale is of a woman, who is not a fit subject of sale, being either the seller's *Mookatuba* or his *Moodubbara*, or not being the property of the seller at all, but of somebody else, or not being property at all, being a free woman, there the sale is *Batil*, and does not create ownership in the purchaser: in such a case, the intercourse would be unlawful for its very essence, and would amount to *Zina* pure and simple for all purposes including *nusub*, although when the question of *Hudd* or punishment arises, the matter is capable of being looked at from other points of view; and although, even when the question of *Iddut* arises, there are other considerations which must not be lost sight of. In this connection see these Tagore Lectures (LXI), regarding the case of a slave girl purchased by a man who has sexual intercourse with her, and the woman afterwards proves that she had been initially a free woman. So also in the case of a Suheeh marriage, intercourse if unlawful at all cannot be unlawful in its

(LXI).—See these Tagore Lectures, Vol. III, page 363, para. marked (IX).

essence, but might be unlawful on account of a *Moojawir* or a concomitant circumstance, and such intercourse does not amount to *Zina*. But there must be a marriage such as the law contemplates and recognizes, in order that such result should follow: there must not be only a seeming and apparent but unreal marriage; on the other hand, there must be a legal and real marriage. In a legal marriage as in a legal sale there must be a fit subject; when the subject is not fit, the marriage or sale is each void; and in void sales there is no property as the result of the sale, and in void marriages the connexion is *Zina*. Therefore, in assuming that in the marriage of the second sister, the connexion is not *Zina* but is unlawful for something else, you assume the very question which is under discussion, *viz.*, you assume that the ceremony of marriage has had a result, and that the marriage has had a legal existence. It is laid down also in the Foosool (LXII), that in the case of a sale of *Hoorr* or free person, there is *Adum-i-Muhul*, or absence of a fit subject.

68. The analogy between the case of a sale of a *Hoorr*, or free person, and that of the *Nikah* of the *Maharim* is thus stated in note 7 of the annotations to the Foosool (LXIII), which is a Commentary on the Oosool-i-Shashee: *Hoorr* is a *muhul* or subject in which the *Hookm* or effect of sale, which is ownership or *milk*, is not possible: the cause or *illut* of ownership which is sale, is, therefore, not possible in this *muhul:* a *Maharim* is a *muhul* or subject in which the *Hookm* of marriage which is *Hill-i-Wuty* or lawfulness of enjoyment is not possible: the cause or *illut* of *Hill-i-Wuty*, which is *Nikah*, is, therefore, not possible in this *muhul*.

69. It now remains (as foreshadowed in paragraph 2 of this Appendix) to discuss the question from the point of view of a *Moojtuhid-fee* matter. What is generally speaking such a matter may be gathered by a reference to certain portions of the Fatawai Kazee Khan, translated in these lectures, and the notes if any annexed to such portions (LXIV). It is supposed that

(LXII).—See Foosool, page 326.

(LXIII).—See Foosool, page 85.

(LXIV).—See these Tagore Lectures, Vol. II, p. 76, paragraph 1101 (201).

" " " " II, p. 295 " 1642 (742).
" " " " III, p. 242 " 2514 (1614).
" " " " III, p. 246 " 2519 (1619).
" " " " III, p. 308 " 2669 (1769).
" " " " III, p. 309 " 2673 (1773).
" " " " III, p. 328 " 2740 (1840).
" " " " III, p. 328 " 2741 (1841).

See also Arabic Hedaya, Vol. III, page 323, and Hamilton's Hedaya, Volume II, page 635.

See also Futhool Kudeer, Vol. III, p. 270.

the question of *nusub* is a *Moojtuhid-fee* matter; so that in spite of the positive texts of the Koran directly on the question of marriage, *viz.*, on the question what women it is lawful and what women it is unlawful to marry, it is contended that there is still no such text directly on the question of *nusub*; and that when a positive text bearing directly on the question of marriage, *viz.*, on the question what women it is unlawful to marry, has been contravened, still the question of *nusub* relating to the children born of such marriage, which has taken place in contravention of the positive text, is not taken to be decided by that positive text, but must depend on the *Kyas* or reasoning or ratiocination of the *Moojtuhid* or jurist, who has to deal with the question of the *nusub*. If this contention be correct, then what is the basis on which the *Kyas* in question is to be founded. I am glad to say that the *Kyas* which I am able to place before the Court is in the same line as the positive texts of the Koran, and that such *Kyas* does not militate against those texts.

70. The Moosullum-ool Suboot (LXV) looks at the question from a sound rational and sensible point of view, and shows that, although the person who causes the conception, should have the *nusub* attributed to him, still the tradition of the Prophet intervenes and points out the true rule which is that there must be a duly constituted *Firash*. This reasoning is also to be found in the Foosool as set forth above (LXVI). The Foosool also shows (LXVII) that the establishment of *nusub* depends on the existence of ownership in the *muhul*, whether such ownership arises from marriage or from possession. The distinction between *Shoobha-i-fail* and *Shoobha-i-mukul* also supports my view. The Futwa is also given according to the view advocated by me. Aboo Haneefa's view does not afford the governing rule in a case of *nusub*, and *Shoobha-i-akd* is not a separate and independent class of *Shooba* so far as *nusub* is concerned (LXVIII) although it may be sufficient to make the *Hudd* drop. The result of a sound and healthy *Kyas* therefore points to the conclusion that the *nusub* in the case in question is wanting.

71. Mr. Baillie seems to argue thus:—*nusub* cannot be negatived unless the marriage is void. Marriage cannot be void unless the connexion amounts to *Zina*, for which the law prescribes a *Hudd*. A connexion

(LXV).—See these Tagore Lectures, Vol. III, p. 375, note to para. 2872 (1972).

(LXVI).—See para. 56, p. XXIV, of this Appendix.

(LXVII).—See para. 55, page XXIV, of this Appendix.

(LXVIII).—See para. 59 page XXVII, of this Appendix.

cannot amount to *Zina* unless there is perpetual prohibition. There cannot be perpetual prohibition unless the case amounts to one of consanguinity, affinity or fosterage. The case of two sisters is not a case of consanguinity, affinity or fosterage; therefore, the case of two sisters is not that of perpetual prohibition. Not being a case of perpetual prohibition, the case of two sisters does not amount to *Zina:* not being a case of *Zina,* the case of two sisters does not amount to a void marriage. The marriage not being void, the *nusub* is not negatived.

72. Baillie says, (LXIX), "If connexion under the contract exposes the parties to *Hudd,* the connexion itself must be *Zina,* and the fruit of it illegitimate; and consequently it would seem that the marriage itself must be void." Again (LXX), "When a Moslem marries a woman whom it is not lawful for him to marry, he is liable to *Hudd* according to the author of the Hedaya. The connexion therefore must be *Zina;* and if it can be shewn that it is only to intercourse with *Maharim* or women who are perpetually prohibited to a man that the term *Zina* is applicable, even according to Aboo Yusoof and Mahomed, when the intercourse has taken place under the sanction of marriage or slavery, then it will equally follow that it was only of such women that the author of the Hedaya was speaking when he said that the intercourse would expose the parties to *Hudd.*" Again (LXXI), "Leaving this class as doubtful, it is only of the three first classes of women, or those who are prohibited by reason of consanguinity, affinity or fosterage, that it can be said that they are *Maharim* or perpetually prohibited, or that intercourse with them, when under the sanction of marriage, would expose the parties to *Hudd.* Of them only, therefore, can it be averred that marriage contracted with them would be void according to Aboo Yusoof and Mahomed."

73. In other words, Baillie seems to have been under the impression that if the connexion does not amount to *Zina,* then it is neither illegal nor invalid, but that, on the other hand, it is legal and valid. In answer to this view I have only to point to the cases of *Shoobha-i-fail* where the connexion does not amount to what is technically known as *Zina,* but still the connexion is not valid, and *nusub* is not established. It must not be forgotten that *Zina* has two acceptations: firstly,—it means illegal or

(LXIX).—See Baillie's Digest of the Mahomedan Law, page 151.
(LXX).—See " " page 152.
(LXXI).—See " " page 154.

unauthorised connexion, for which the Koran prescribes a fixed punishment, which is severe in the extreme; and secondly,—it means illegal or unauthorised connexion, which does not fall within the meaning of the term as contemplated by the Koran, but which is withal unjustifiable and invalid being illegal and unauthorised, and for which the Mahomedan law prescribes a punishment, though the punishment is not laid down by the Koran (LXXII). Mr. Baillie seems to have overlooked this distinction.

74. Mr. Baillie seems also to have been influenced by the distinction between perpetual illegality or *Hoormut-i-Mowabbud*, and temporary illegality or *Hoormut-i-Mowukkut* (LXXIII); between unlawfulness in itself and unlawfulness for something else (LXXIV). But the question under consideration cannot be affected by this distinction. No doubt, a *Mujoosee* woman is rendered lawful by Islam or by conversion to the Christian or Jewish religion, but she must be taken as she stands at the time of the marriage, not what she would be after a certain event, that is, after her conversion; and it is not true that because she is temporarily unlawful, therefore connection with her does not also come within what is unlawful in itself, but falls within that class which is unlawful for something else (See paragraph 29 of this Appendix). If the *Mujoosee* woman is a slave girl, then, inasmuch as servitude gives the owner a right of enjoyment, connexion with her would be unlawful for something else: but if there is no ownership of her person, and if connexion takes place with her without such ownership, then that connexion is unlawful in itself. But although a man might own her as a slave, still it is not possible to contract a marriage with her*: the instance of a case where in spite of a valid marriage, that is, in spite of ownership by marriage, connexion is unlawful for something else, is where a man has connexion with his wife in her menses. As already pointed out (see paragraphs 65, 66 and 67 of this Appendix) there must be legal ownership present at the time of the connexion—because without existing ownership the connexion is unauthorized and illegal.

75. As regards another instance cited in Baillie's Digest (LXXV),

(LXXII).—See Hamilton's Hedaya, Volume II, pages 1 and 2, and page 26, line 7, &c. See also this matter discussed in paragraph 51 of this Appendix.

(LXXIII).—See Baillie's Digest of the Mohamedan Law, page 151.

(LXXIV).—See Do. Do. pages 152 and 153.

(LXXV).—See Do. Do. page 151.

* The right of ownership prevents a marriage from being contracted between the slave girl and her master. See these Tagore Lectures, Volume II, page 126, paragraph 1237 (337).

namely, the case of a man's thrice repudiated wife, the Koran itself declares that the husband cannot marry her unless the aid of the legaliser as provided by law has already been obtained: that instance alone should be sufficient to subvert the general rule laid down by Baillie (see paragraph 31 of this Appendix). Mr. Baillie cites an instance (LXXVI) of a woman having two husbands, that is to say, where the forms of marriage have been gone through twice with two different men. This case is dealt with in the Fatawai Kazee Khan (LXXVII). But the result is, as Zaheerooddin points out and as shown by Baillie, that the offspring belong to the first husband. This shews that a married woman cannot be the *muhul* or fit subject of marriage to another man, and that the legality of the marriage is not to be determined by mere forms being gone through, but must be determined with reference to the question whether the woman is, at the time of the marriage, a fit subject of the particular marriage. In reference to Zaheerooddin's view referred to at the bottom of page 158 of Baillie's Digest, I have reproduced the reasoning in favor of Zaheerooddin's view from the Moosullum-ool-Suboot, based on the tradition referred to by Zaheerooddin (LXXVIII.)

76. Mr. Baillie (LXXIX), seems to have thought that it was the opinion of Aboo Haneefa that the compilers of that work (*viz.*, the Fatawai Alumgiree), had adopted in the present instance, "for though they have given this chapter the heading 'Of *Fasid* Marriages and their Effects,' they have omitted to give any description of the marriages to which that title is applicable, as if with Aboo Haneefa they had rejected the distinction of *Batil* or void marriages altogether. Their evident inclination to the opinion of Aboo Haneefa gives great additional weight to it, and ought perhaps to be decisive of the question in India." Here Mr. Baillie is wrong both in his premises and in his conclusions. Mr. Baillie draws the inference that the compilers of the Fatawai Alumgiree are of opinion that there is no such thing as a void or

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(LXXVI).—See Baillie's Digest of the Mohamedan Law, page 158.

(LXXVII).—See the Fatawai Kazi Khan on the same subject, translated in these Tagore Lectures, Volume II, page 131, paragraph 1247 (347).

(LXXVIII).—See these Tagore Lectures, Volume III, page 375, note to paragraph 2872 (1972) also referred to in paragraph 70 of this Appendix.

(LXXIX).—See Baillie's Digest of the Mohamedan Law, page 155.

Batil marriage; in other words, that it is the Mahomedan Law in India that the marriage of a man with his mother or full sister is a good marriage in the face of the Koran. There is no foundation or justification for such an egregious conclusion. If the distinction between *Batil* and *Fasid* marriages is to be done away with, then the result would be not that the objectionable marriages should be *Fasid* marriages but that they should be *Batil* marriages (LXXX). As regards the omission to define a *Fasid* marriage, that omission should not lead to such a sweeping conclusion as that deduced by Mr. Baillie; because the compilers of the Fatawai Alumgiree were learned *Moulvies* having a thorough acquaintance with the science of Jurisprudence, where the definition of the terms *Saheeh*, *Fasid* and *Batil* as they are properly used in Mohamedan Law, or as they may be applicable to cases of marriage, is to be found in great detail and fulness. Then again, it does not appear, on reading the Fatawai Alumgiree, that void marriages have been done away with, and not noticed in that work. In the Arabic Fatawai Alumgiree, (LXXXI) there is an instance of a marriage by one man with two women one of whom is unlawful to him either by reason of prohibited degrees or because the woman is the wife of another husband, or is an idolatress, and the other woman is lawful to him; and in this case the *nikah* with the latter is held to be *Saheeh* or valid, and the *nikah* with the other woman is held to be *Batil* or void, and the passage in question is translated by Baillie in his Digest at page 35. Again, in the same work (LXXXII), a *nikah-i-mootut* or usufructuary marriage and a *nikah-i-moowukkut* or temporary marriage are both laid down to be *Batil* or void, and this is translated by Baillie at page 18 of his Digest except that in regard to the former marriage a passage in the original has been omitted, *viz.*, (لا يفيد الحل) "that the *moota* marriage *does not result in lawfulness of enjoyment.*" (See paragraph 26 of this Appendix, where the Rudd-ool-Moohtar however puts a temporary marriage under the class of *Fasid* marriages). Then, at page 466 of the Arabic Fatawai Alumgiree, Volume I, comes "Chapter the eighth—"On *Fasid Nikah* and its consequences." It is laid down in the same work as follows (LXXXIII) :—"A man who is a Moslem

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(LXXX).—See this matter discussed in this Appendix, paragraphs 8 and 9, pages IV & V.

(LXXXI).—See Fatawai Alumgiree, Volume I, page 394.

(LXXXII).—See Do. Volume I, page 398.

(LXXXIII).—See Do. Volume I, page 727.

marries his *Maharim*, and she produces a child: the *nusub* of the child shall be established from him according to Aboo Haneefa; but his two disciples have taken a different view: and this conflict arises because the *nikah* is *Fasid* according to Aboo Haneefa but *Batil* according to them."

77. The Fatawai Kazee Khan (LXXXIV) is a positive authority for the position that the subsequent marriage with the second sister during the lifetime of the first wife, her sister, is *Batil* or void.

78. As regards the law of acknowledgment, there can be no acknowledgment of the product of a void marriage (LXXXV). The Privy Council has held that there must be no insurmountable obstacle to the marriage. The paternity of the child must not be known, and the child must admit the acknowledgment. *Nusub* is established by acknowledgment by a presumption arising under certain circumstances—and those circumstances must be such as to be consistent with the supposition of there having been a *Suheeh* or valid marriage between the parents; but when the marriage is void and is known to be void, there *nusub* cannot be established by acknowledgment and treatment, which operate on account of a presumption which cannot be raised here.

79. It is necessary here to show what the commentators on the Koran have to say on the text of the Koran under consideration. That text is produced in these Lectures (LXXXVI) according to the translation given in Rev. Wherry's work. A closer translation is given in the Law Reports (LXXXVII). A still closer translation is this "unlawful upon you are your mothers, &c., &c., and the *Halail* or lawful spouses of your sons, etc., etc., *and that you should make junction between two sisters except what has verily passed.*" Palmer's translation is as follows (LXXXVIII) "Unlawful for you are your mothers, etc., etc., and the lawful spouses of your sons from your own loins *and that ye form a connection between two sisters except bygones.*" I will translate the comments of the Tufseer-i-Kubeer, (LXXXIX) on this text, as that work possesses the very highest authority as a commentary on the Koran.

(LXXXIV).—See these Tagore Lectures, Volume II, page 111, para. 1206 (306).

(LXXXV).—See I. L. R. 10, Allahabad Series, page 289; see also Moore's I. A., Volume III, page 317.

(LXXXVI).—See these Tagore Lectures, Volume I, page 19, paragraph 120 (116).

(LXXXVII).—See I. L. R. 23, Calcutta Series, page 147.

(LXXXVIII).—See Sacred Books of the East, Volume VI, page 75.

(LXXXIX).—See Arabic Tufseer-i-Kubeer, Volume III, page 192, Egyptian Edition of 1308 Hijree.

80. "And that you should make junction between two sisters except what has verily passed." The Tufseer-i-Kubeer on the text says as follows:—In this text there are several rules (or *masail*). The first rule (or *masala*) is this, that the expression, "and that you should make junction between two sisters" is in the position of the nominative, because the (*Tukdeer* or) implication is this,—"unlawful upon you are your mothers and your daughters and the *junction* (or *juma*) between two sisters." The second rule (or *masala*) is this,—the junction between two sisters can take place in three ways: (1) either when a man marries both of them together (that is, joins both of them in marriage, whether he marries both of them at once, or marries them one after the other); or (2) becomes the owner of both of them together; or (3) marries one of them and becomes the owner of the other. Now as regards (1), the joining of both the sisters in marriage, this can take place in two ways: one is (A), when he makes the contract (of marriage), with both of them together (that is, marries them by one contract); in this case the rule can only be either (*a*) that both should become validly married (*Juma*); or (*b*) that a particular one should become validly married (*Taayeen*); or (*c*) that the husband should be left the choice to select one of the two as the one validly married (*Tukhyeer*); or (*d*) that the marriage should be (*Batil* or) void altogether (as regards both): the first alternative (*a*), that both should become validly married is (*Batil* or) void by the force of this very text, so has it been laid down by lawyers; except that this result is difficult according to the principle of Aboo Haneefa, on whom be peace, because (*Hoormut* or) unlawfulness does not necessitate avoidance according to the view of Aboo Haneefa; dost thou not see that joining together divorces (that is, pronouncing more than one divorce in one period of purity) is unlawful (or *Huram*) according to him, but the divorces (when pronounced in the plural at one and the same time) do take place; so also a negative command (or *nahee*) against the sale of one dirhem for several dirhems (or usury), does not prevent the contract from being effectual; and such is also the case in all sales which are *Fasid*; it is, therefore, clear that to rely on the rule regarding negative commands (or *nahes*) for the purpose of holding the marriage to be *Batil* (*Fasid* is here used; but it is evident that *Fasid* is used in the sense of *Batil*) is not compatible with the view of Aboo Haneefa (because a thing may be unlawful but it is not necessarily void, just as in the aforesaid illustration of plural divorces pronounced at one and the same time):—and if it be

argued that this result follows according to your view also because divorce during the period of impurity (or whilst the courses are on), or during the period of purity in which the husband has had intercourse with the wife, is a thing against which there is a negative command (that is, such divorce is *munhee anho*), but still such divorce does take effect; then (in answer to this argument) I say that in those cases the distinction is fine and rare, which I have pointed out in the Khilafeeut; and whoever feels inclined to know the distinction should refer to that work. Therefore, it is proved (as regards *a*) (the proposition) that both should become validly married is void (or *Batil*). That a particular one should become validly married (*b*) is also (*Batil*) or void because (*Turjeeh* or) to give preference without there being any (*Moorujjih* or) circumstance leading to the preference, is void (or *Batil*). That the husband should be left the choice (or *Tukhyeer*) to select one of the two as the one validly married (*c*), is also void (or *Batil*), because to hold that there is a choice, necessarily implies that the contract has become operative, and that the same subsists up to the time of election (just as in a case of a marriage dependent on election), and verily have we laid down that it is void (as laid down in *a*). Therefore the only alternative left is (*d*. that the marriage is *Batil* or void as regards both, that is to say) to hold that the contracts with regard to both (*i.e.*, that the joint contract entered into in regard to both) are *Fasid* (in other words, *Batil*, that being the expression used in the proposition *d*, thus shewing that *Fasid* is here used for *Batil*). *The second way* (B), *of the ways* (pointed out in 1) *where there* may *be junction* (of two sisters in marriage), *is, that the man marries one of the two sisters at one time and then marries the other sister afterwards. Here the decision* (or rule, *i.e., Hookm*) *is, that the second marriage is* (*Batil* or) *void, because* (*Dufa* or prevention is easier than *Rufa* or dissolution, that is to say), *to hold that the marriage was not at all contracted is more in consonance with principle than to hold that the marriage was contracted, and then dissolved* (or, in other words, the undoubted rule being, that the marriage is not recognised as a marriage, and the Kazee must effect a separation, there are two ways of looking at that rule; that is either that there was no marriage at all, or that there was a marriage but it has been dissolved. The correct way to look at such a marriage is, that there was no marriage at all, not that the marriage was done and that it came into being, but was subsequently undone and destroyed), &c., &c.

81. Lastly, it will be useful to know as a whole how *Hoosn* or good

ness or excellence, and *Koobuh* or badness have been divided by the Mahomedan Jurists. The Fowatih-ool-Ruhmoot, which is a commentary by Mowlana Abdool Ally Buhrool Ooloom on the Moosullum-ool Suboot (XC) thus discusses the subject. The followers of Aboo Haneefa have divided *Hoosn* into two classes,—Hoosn-lai-Ainhee (A) or goodness in itself, and Hoosn-lai-Ghyrhee (B) or goodness for something else. Hoosn-lai-Ainhee (A) is subdivided into two classes; that (A1) which does not admit of cessation (or *Sakoot*); as for example (Eman or) faith (in the Unity of God and in Islam), by which is meant belief entertained in the mind (or Tusdeek-bil-Kulb) which does not admit of cessation even under circumstances of compulsion; and that (A2) which admits of cessation (or *Sakoot*); as for instance expression or declaration of faith which admits of cessation (or *Sakoot*) under circumstances of compulsion; and also for instance prayer when the appointed time has passed away: in the case of prayer of the Asir class, that is, those which are obligatory in the afternoon, it might, however, be said that if that prayer is neglected until the setting of the sun, there the *Koobuh* or badness preponderates, and the *Hoosn* or excellence subsists, because the *Nufil* prayers are allowable even when the strict time for afternoon prayer has passed away: the correct example of this class is however the prayers of a woman in her courses, whose prayers are Kubeeh-lai-Ainhee, or bad in their essence, so that no Kuza or compensatory prayers in her case are obligatory.

Hoosn-lai-Ghyrhee (B) is subdivided into two classes, *viz.*, that (B1) which is (*Moolhik* or) related to Hoosn-lai-Ainhee, and that (B2) which is not so related. In this class (B1) the excellence exists in the thing itself though it is induced by (*ghyr* or) something else, which something else is in the nature of an intermediary (or Wasta-fil-Suboot), which of itself possesses no (*Hoosn or*) excellence, being beyond the power and control of the individual; *e.g.*, Zukat or poor rate; and Soum or fast; and Huj or pilgrimage to Mecca. Zukat is depriving one's self of property, and has no excellence in itself; but the (*Wasta* or) intermediary is the want or poverty of another person over which the individual has no control; this want therefore possesses no *Hoosn* or excellence but such want requires that the same should be met by the gift of a small portion of the property of one who is in affluent circumstances and this constitutes Zukat: Zukat therefore derives excellence of its

(XC).—See Fowatih-ool-Ruhmoot, p. 27, Newal Kishore's Edition of Lucknow, of January 1878.

essence from poverty which is an intermediary or Wasta. So also Soum or fast has no excellence in itself, being a denial to one's self of ordinary necessaries; but the Wasta or intermediary is *Nufs* or self, which requires that when it becomes turbulent it must be brought and kept under control by abstinence from three things, *viz.*, eating, drinking and sexual connexion, and this denial or privation is what constitutes fast, which derives *Hoosn* from the intermediary or Wasta, which possesses no excellence in itself, but induces excellence in the essence of fast. So also Huj, which of itself does not possess excellence; but the intermediary is Bait or Mecca, which has no excellence in its essence in the sense here in question. Bait requires that respect should be shewn to it in a particular manner, and this is what constitutes Huj, which thus derives excellence from the Wasta or intermediary, which induces in the Huj excellence in itself.

The class (B2) is a class in which the excellence does not exist in its essence either in its own right or derived from and induced by means of an intermediary or Wasta; on the other hand, it is a class in which the excellence exists only in the Wasta or intermediary, which is called wasta-fil-oorooz; but there being a connection between that class and the Wasta or intermediary, the excellence in the latter is referred to and gets reflected in that class.

This class (B2) is subdivided into two classes,—*viz.*, (C) where the intermediary or Wasta is discharged as an obligation by the doing of the act itself, and (D) where the intermediary or Wasta is not so discharged. As instances of sub-division C are cited Jehad or holy war, *Hudd* or punishment, and Sulat-i-Junaza, or funeral service, that is, prayers for the dead. Jehad is a thing in which there is no excellence in itself, because it consists of killing and other acts, which cause pain and suffering; but the excellence is in the promulgation of the true religion and the subversion of Koofr or infidelism, and Jehad results in such excellence; and that excellence becomes connected with Jehad which thus derives excellence from something else; the promulgation and subversion also get accomplished by the Jehad, and Jehad therefore comes to be classified in subdivision C. It cannot be argued that as in class (B1) so in this class C, the act of Jehad for instance amounts to excellence in itself, although the excellence might be derived from an intermediary; it cannot be argued so, because if Jehad had been excellent in itself, the obligation would not cease by reason of doubt, as Jehad does cease by reason of doubt. So also *Hudd* or

punishment has no excellence in itself, being the infliction of pain; but the excellence consists in what is a deterrent to others, and *Hudd* results in acting as a deterrent; there being thus a connection between *Hudd* and the deterrence, the excellence of the latter gets connected with the former: it cannot be argued in this case likewise that the deterrence might be regarded as an intermediary or Wasta, and therefore it makes *Hudd* excellent in itself; because if *Hudd* had been excellent in itself why should it drop from doubt. *Hudd* falls in subdivision C because by the act the obligation gets discharged also. So also Sulat-i-Junaza or the prayer for the dead has no excellence in itself: but respect for the Islam of the deceased does possess excellence, and there being connection between such prayer and such respect, the excellence of the latter gets connected with the former: the same act also satisfies the obligation, and therefore the prayer falls in sub-division C. It cannot be argued that the prayer for the deceased acquires excellence in itself through an intermediary or Wasta, which reflects excellence on the prayer so as to make it excellent in itself; because if the prayer had excellence in itself, it would have been obligatory on everybody, whereas it is obligatory only on some of the party.

As instances of sub-division D are cited the obligation to proceed to the mosque when there is a call for Friday prayers: to proceed to the mosque on such an occasion possesses no excellence in itself; but the excellence is in the prayers; and inasmuch as there is connection between going to the mosque and the prayers, the act of going to the mosque acquires excellence from something else, which is the prayer; but the obligation of the prayer does not get discharged and fulfilled by the mere act of proceeding towards the mosque. So also Wazoo, or purification, has excellence for something else, which is the prayer, but the prayer itself does not become discharged by the purification.

Similarly *Koobuh* or badness is divided in the same way as *Hoosn* into Koobuh-lai-Anihee (E) and Koobuh-lai-Ghyrhee (F).

E is sub-divided into (G) where the *Koobuh* is not possible of cessation or Sakoot, *e.g.*, Shirk or idolatry, the badness of which is inherent in it, and is of the essence of it; and into (H) where the badness can cease and drop; as for instance the lawfulness to eat carcase (or *maita*) in a state of (Mukhmusa or) starvation.

F is sub-divided into two classes (I) where the *Koobuh* accompanies and becomes realised and accomplished by the act, as for instance, fast

on the day of the *Eed;* such fast is prohibited for something else which consists in repudiating the (*Zyafut* or) feast provided by God on the day of the *Eed*, and by the fast the repudiation is accomplished. The other class of (F) is where the *ghyr* or something else, which is the cause of badness does not get accomplished by the act; as for instance, to sell at the time of the call to prayers; the badness of such sale is derived from the circumstance that it prevents attendance to Friday prayers.

As regards F or badness for something else there is no sub-division similar to that in B, which is the class comprising Hussun-lai-Ghyrhee, or goodness for some thing else: that is to say, it cannot be said that there is a class where the badness is in the essence though induced by *wasta-fil-suboot* or intermediary* inasmuch as the intermediary becomes negatived, *e.g.*, usurpation, where the badness arises in consequence of the right of the real owner being concerned, but the wasta or intermediary becomes negatived, and the badness consequently comes to be attached to the very essence, and usurpation (or Ghusub) is therefore bad on account its very essence.

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* The terms Wasta-fil-Oorooz and Wasta-fil-Suboot require explanation. A Wasta is an intermediary. In the former it is the Wasta or intermediary that really possesses the quality in question, *e.g.*, a person riding a carriage; here the carriage is the Wasta or intermediary; when the carriage is in motion, the quality of motion really belongs and is attached to the Wasta, but as the change of place consequent on the motion is found in the rider also, therefore the quality of motion is referred and comes to be assigned to the rider also, but in reality the motion is a quality which actually belongs only to the carriage. In Wasta-fil-Suboot, the quality comes to appertain to the thing itself although through an intermediary, *e.g.*, if a piece of cloth is colored, the intermediary is the person through whose agency the colour becomes the quality of the cloth, but the color attaches to the cloth itself, and the person is only an intermediary.

ذلك ان ولدت لاقل من سنتين من وقت طلاق الاول و لاقل من ستة اشهر من وقت نكاح الثاني فالولد للاول - و ان ولدت لاكثر من سنتين من وقت طلاق الاول لا يلزم الاول - ثم ينظر ان ولدت لستة اشهر من وقت نكاح الثاني فالولد للثاني و الا فلا *

٢٠٥٦ رجل تزوج امرأة فجاءت بولد فقال الزوج تزوجتك منذ اربعة اشهر و 2056
قالت منذ ستة اشهر كان القول قولها و هو ابن الزوج *

٢٠٥٧ رجل تزوج امة فطلقها ثم اشتراها فجاءت بولد لاقل من ستة اشهر 2057
من وقت الشراء يلزمه - و ان جاءت به لستة اشهر من وقت الشراء لا يلزمه - هذا اذا كان الطلاق واحدا - فان طلقها ثنتين يثبت النسب الى سنتين من وقت الطلاق * والله اعلم بالصواب *

* تمت *

٢٠٥٠ و كذا المبتوتة و المطلقة طلاقا رجعيا اذا ادعت الولادة عند ابي حنيفة 2050
رحمه الله تعالى لايثبت الولادة بشهادة القابلة الا اذا كان الحبل ظاهرا
او كان الزوج اقر بالحبل *

٢٠٥١ و اجمعوا على ان المنكوحة اذا قالت ولدت منك و انكر الزوج 2051
يثبت الولادة بشهادة القابلة و يلاعن بينهما - فاذا امتنع اللعان لمعنى
من قبل الزوج كان عليه حد القذف *

٢٠٥٢ هذا اذا لم تقر المرأة بانقضـــاء العدة - فان اقرت بانقضاء العدة 2052
بعد زمان ينقضي فيها العدة ثم ولدت لستة اشهر من وقت الاقرار
لايثبت نسبه من الزوج - و ان ولدت لاقل من ذلك يثبت النسب
و يبطل اقرارها *

٢٠٥٣ الآئسة التي تعتد بالاشهر اذا ولدت يثبت نسب ولدها في الطلاق 2053
الى سنتين اقرت بانقضاء العدة او لم تقر *

٢٠٥٤ و الصغيرة اذا طلقها الزوج بعد الدخول ثم ولدت ان اقرت بانقضاء 2054
عدتها بعد ثلثة اشهر ثم ولدت لاقل من ستة اشهر يثبت نسب ولدها
منه - و ان ولدت لاكثر من ستة اشهر لا يثبت النسب - و الطلاق الرجعي
و البائن فيه سواء - و ان لم تقر بانقضاء العدة و ادعت انها حامل فان
كان الطلاق بائنا يثبت النسب الى سنتين من وقت الطلاق - و ان
كان رجعيا يثبت النسب الى سبع و عشرين شهرا - و ان لم تدع الحبل
و لم تقر بانقضـــاء العدة قال ابو حنيفة و محمد رحمهما الله تعالى
هذا و ما لو اقرت بانقضاء العدة بثلثة اشهر سواء - و قال ابو يوسف رح
هذا و ما لو ادعت الحبل سواء *

٢٠٥٥ المعتدة عن طلاق بائن اذا تزوجت بزوج آخر في العدة و ولدت بعد 2055

بمنزلة الصحيح - و قال مشائخنا رح اذا عجز عن مصالح خارج البيت يعتبر مريضا و قد ذكرنا *

٢٠٤٨ مريض طلق امرأته ثم مات بعد زمان و هي تقول لم تنقض عدتي كان 2048 القول قولها مع اليمين - فان نكلت لا ترث - و ان حلفت ورثت - و لو انها لم تقل شيئا حتى تزوجت قبل موت المريض بعد زمان تنقضي فيها العدة ثم قالت لم تنقض عدتي لا يقبل قولها - و لو انها لم تتزوج لكنها قالت بعد الطلاق انقست ثم مات زوجها بعد ما مضت ثلثة اشهر من وقت اقرارها لا ميراث لها - و ان تزوجت بزوج آخر و ولدت من الزوج الثاني كان لها الميراث من الزوج الاول و يفسد النكاح الثاني - و لو انها لم تلد بعد التزوج و لكنها قالت حضت كان للزوج الثاني ان يصدقها و لا يفسد النكاح الثاني و تصير كالمعتدة اذا اقرت بانقضاء العدة ثم تزوجت ثم انكرت انقضاء العدة لا يصح انكارها * و الله اعلم *

فصل في النسب

٢٠٤٩ امرأة ولدت بعد موت زوجها ما بينها و بين سنتين ان صدقتها الورثة 2049 في الولادة يثبت نسب الولد من الميت في حق من صدقها - و هل يثبت النسب في حق غيرهم - ان كان يتم نصاب الشهادة بهم يثبت و هل يشترط لفظة الشهادة في اثبات النسب في حق غيرهم اختلفوا فيه - قال بعضهم لا يشترط - و قال بعضهم يشترط كما يشترط نصاب الشهادة و ان جحدت الورثة الولادة لا يثبت الولادة و لا النسب الا بشهادة رجلين او رجل و امرأتين في قول ابي حنيفة رحمه الله تعالى - و قال صاحباه رح يثبت بشهادة القابلة *

و العدة و اللعان في قول ابي حنيفة رحمه الله تعالى لا يرثها الزوج - و
ان لم تكن طلاقا كالفرقة الواقعة بخيار البلوغ من الصغيرة و خيار العتق
و ردة المرأة ورثها الزوج *

2043 ٢٠٤٣ وجل قال لامرأته اذا مرضت فانت طالق ثلثا فمرض و مات في ذلك
المرض و هي في العدة ورثته المرأة - و قال ابو القاسم الصفار رح لا ترث
و الصحيح هو الاول *

2044 ٢٠٤٤ امرأة قالت لزوجها المريض طلقني فطلقها ثلثا ثم مات و هي في
العدة كان لها الميراث - لانه صار مبتدعا فلا يبطل حقها عن الميراث كما لو
قالت طلقني تطليقة رجعية فابانها *

2045 ٢٠٤٥ المسلول اذا طلق امرأته وقد طال ذلك ولم يضنه كان بمنزلة الصحيح *

2046 ٢٠٤٦ و اما المقعد و المفلوج قال في الكتاب ان لم يكن ذلك قديما فهو
بمنزلة المريض فيكون فارا - و ان كان قديما فهو بمنزلة الصحيح - لان هذه
علة مزمنة و ليست بقاتلة - و تكلم المشائخ فيه - قال محمد بن سلمة رح
ان كان يرجى برؤه بالتداوي فهو بمنزلة المريض - و ان كان لا يرجى فهو
بمنزلة الصحيح - و قال ابو جعفر الهندواني ان كان يزداد كل يوم فهو
مريض - و ان كان يزداد مرة وينقص اخرى ينظر ان مات بعد ذلك
بسنة فهو بمنزلة الصحيح - و ان مات قبل سنة فهو بمنزلة المريض - و
روى ابو نصر العراقي رح عن اصحابنا رح انه ينظر ان كان يصلي قاعدا
فهو بمنزلة المريض - و ان كان يصلي مضطجعا فهو بمنزلة الصحيح *

2047 ٢٠٤٧ و تكلموا ايضا في الرجل اذا عجز عن القيام بمصالح خارج البيت
و هو يقدر على القيام بمصالح داخل البيت قال مشائخ بلخ رح اذا
قدر على القيام بحوائجه سواء كان في البيت او خارج البيت فهو

٢٠٣٤ و لو قال المريض لامرأته الامة اذا اعتقت فانت طالق ثلثا فاعتقها 2034
مولاها ثم مات الزوج و هي في العدة كان لها الميراث *

٢٠٣٥ و لو قال لامرأته الامة انت طالق ثلثا غدا و قال لها مولاها انت 2035
حرة غدا او بدأ المولى ثم الزوج فجاء غد يقع الطلاق و العتاق
و لا ترث المرأة *

٢٠٣٦ و لو قال المولى لامته انت حرة غدا و قال زوجها انت طالق ثلثا 2036
بعد غد ان علم الزوج بكلام المولى يكون فارا و الا فلا *

٢٠٣٧ رجل اعتق امته و هي تحت زوج ثم طلقها الزوج ثلثا في مرضه و هو 2037
يعلم بعتقها اولا يكون فارا *

٢٠٣٨ اذا قال المسلم المريض لامرأته الكتابية اذا اسلمت فانت طالق ثلثا 2038
فاسلمت ثم مات الزوج كان فارا *

٢٠٣٩ امرأة ادعت على زوجها المريض انه طلقها ثلثا فجحد و حلفه القاضي 2039
فحلف ثم صدقته المرأة و مات ان رجعت الى تصديقه قبل الموت
كان لها الميراث - و ان رجعت الى تصديقه بعد موته لايصح تصديقها *

٢٠٤٠ مريض قال لامرأتين له ان دخلتما الدار فانتما طالقان ثلثا فدخلتا 2040
الدار معا ثم مات و هما في العدة ورثتا - و ان دخلت احدٰهما قبل
الاخرى ورثت الاولى دون الثانية *

٢٠٤١ رجل قال لامرأته في صحته اذا شئت انا و فلان فانت طالق ثلثا 2041
فمرض فشاء الزوج و الاجنبي الطلاق معا او شاء الزوج ثم الاجنبي
ثم مات الزوج لا ترث - فان شاء الاجنبي اولا ثم الزوج ورثت *

٢٠٤٢ و اذا وقعت الفرقة بين الزوجين في مرض المرأة بفعلها ثم ماتت 2042
في العدة ان كانت الفرقة طلاقا كالفرقة الواقعة باختيارها بسبب العجب

العدة الاولى - فان كان الطلاق الاول في المرض ورثت - و ان كان الطلاق الاول في الصحة لم ترث *

٢٠٢٨ اذا ارتد الرجل و العياذ بالله فقتل او لحق بدار الحرب او مات في 2028
دار الاسلام على الردة ورثته امرأته - و ان ارتدت المرأة ثم ماتت او لحقت بدار الحرب انكانت الردة في الصحة لايرثها زوجها - و ان كانت في المرض ورثها زوجها استحسانا - و ان ارتدامعا ثم اسلم احدهما ثم مات احدهما ان مات المسلم منهما لايرثه المرتد - و ان مات المرتد انكان الذي مات مرتدا هو الزوج ورثته المسلمة - و ان كانت المرتدة قد ماتت فان كانت ردتها في المرض ورثها الزوج المسلم - و ان كانت في الصحة لم يرث *

٢٠٢٩ اذا طاوعت المرأة ابن زوجها و هي مريضة ثم ماتت في العدة 2029
ورثها الزوج استحسانا *

٢٠٣٠ امرأة طلقها زوجها ثلثا و مات فقالت كان الطلاق في المرض و قالت 2030
الورثة كان الطلاق في الصحة كان القول قول المرأة *

٢٠٣١ و لو كانت المرأة امة قد اعتقت و مات زوجها فادعت المرأة العتق 2031
في حيوة الزوج و ادعت الورثة انه كان بعد موته كان القول قول الورثة - فان قال مولى الامة كنت اعتقتها في حيوة زوجها لا يقبل قول المولى *

٢٠٣٢ و كذا لو كانت المرأة كتابية تحت مسلم فاسلمت و مات زوجها 2032
فقالت اسلمت في حيوة الزوج و قالت الورثة لا بل بعد موت الزوج كان القول قول الورثة *

٢٠٣٣ مريض طلق امرأته ثم قتلت زوجها لاترث * 2033

و في جانب الرجل العجز عن المصالح الخارجة - اما الذي يذهب و يجيء في حوائجه و يحم كل يوم فهو كالصحيح - و المقعد و المفلوج الذي لايزداد مرضه كل يوم فهو كالصحيح - و كذا صاحب الجرح و الوجع الذي لم يجعله صاحب فراش فهو كالصحيح *

2021 ٢٠٢١ و ان طلق صاحب الفراش امرأته ثم قتل او مات بسبب آخر في ذلك المرض فهو فار *

2022 ٢٠٢٢ و الذي يكون موازيا للعدو في صف القتال اذا طلق امرأته لايكون فارا و ان خرج للبراز و طلق يكون فارا - و عن ابي حنيفة رحمه الله تعالى في النوادر انه لا يكون فارا *

2023 ٢٠٢٣ و المحبوس بقصاص او رجم اذا طلق لايكون فارا - و لو اخرج ليقتل فطلق يكون فارا *

2024 ٢٠٢٤ و راكب البحر اذا انكسرت السفينة و بقي على لوح فطلق يكون فارا و ان طلق بعد اضطراب السفينة قبل الانكسار لايكون فارا *

2025 ٢٠٢٥ و لو كان صاحب فراش و طلق ثم صح ثم مرض و مات في العدة لايكون فارا *

2026 ٢٠٢٦ و لو قال المريض لامرأته كنت طلقتك ثلثا في صحتي فكذبته المرأة ثم مات و هي في العدة ورثت المرأة *

2027 ٢٠٢٧ ولو طلق المريض امرأته بعد الدخول طلاقا بائنا ثم قال لها اذا تزوجتك فانت طالق ثلثا ثم تزوجها في العدة طلقت ثلثا - فان مات و هي في العدة فهذا موت في عدة مستقبله في قول ابي حنيفة و ابي يوسف رحمه الله تعالى فيبطل حكم ذلك الفرار بالتزوج - و ان وقع الطلاق بعد ذلك الا ان التزوج حصل بفعلها فلا يكون فارا - و على قول محمد رح عليها اتمام

حيضتين بعد فساد النكاح كان عليها ان تعتد بثلث حيض ولاحداد فيها *

٢٠١٥ و المعتدة عن النكاح الفاسد تخرج ولاحداد عليها - كما لا يجب عليها 2015
عدة الوفاة *

٢٠١٦ ولاحداد على الكتابية * والله اعلم * 2016

فصل فى المعتدة التي ترث

٢٠١٧ رجل طلق امرأته رجعيا ثم مات و هي فى العـــدة ترث كان الطلق 2017
فى الصحة او فى المرض - و كذا لو ماتت المرأة فى العدة ورثها الزوج *

٢٠١٨ و ان ابانها فى الصحة ثم مرض و مات و هي فى العدة لم ترث - و ان 2018
ابانها فى المرض ان ابانها بسوالها لا ترث ايضا - و ان ابانها بغير سوالها ثم
مات و هي فى العدة ورثته عندنا - و ان مات بعد انقضاء العدة لم ترث - و
قال مالك و ابن ابي ليلى ترث لها الميراث *

٢٠١٩ و الاصل فيه ان احد الزوجين اذا باشر الفرقة بعد ما تعلق حق الآخر 2019
بماله ورثه الآخر - و انما يتعلق الحق اذا صار بحال كان الغالب من حاله
الهلاك بمرض او غيره لا باصل المرض - لان الادمى لا يسلم عن المرض
و ليس كل مرض يفضي الى الهلاك *

٢٠٢٠ و لابد من حد ضابط - قالوا ان كان المريض رجلا افناه المرض حتى 2020
صار صاحب فراش و عجز عن القيام بالمصالح الخارجة و يزداد كل يوم
مرضه يتعلق حق الآخر بماله - لان الغالب من حاله الهلاك - فاذا طلق
امرأته في هذه الحالة يكون فارا - و ان كانت المرأة مريضة قال بعضهم
ان كانت لا تقدر ان تصلي قائمة و لا تذهب الى المخرج من غير
معين كانت صاحبة فراش - يعتبر في جانبها العجز عن المصالح الداخلة

٢٠٠٧ و ان كانت في بيت بالكراء كان الكراء على الزوج - فانكان الزوج غائبا 2007
وطلب منها صاحب الدار الاجرة ادت وسكنت - فان لم تجد الاجرة كان
لها ان تنتقل - و كذا لو اخرجها اهل الدار *

٢٠٠٨ و ان كانت المعتدة صغيرة كان لها ان تخرج الا اذا كان الطلاق رجعيا 2008
فلا تخرج الا باذن الزوج *

٢٠٠٩ و الكتابية بمنزلة الصغيرة في ذلك * 2009

٢٠١٠ و ان كانت المعتدة مملوكة قنة او مكاتبة او ام ولد كان لها ان تخرج 2010
اذا لم يبوءها المولى بيتـــا - فان بوأها المولى بيتـــا لاتخـــرج الا اذا
اخرجها المولى *

٢٠١١ و تجتنب المعتدة كل زينة نحو الكحل و الحناء و الخضاب و الدهن 2011
و التحلي و التطيب و ليس المطيب و المصبوغ بالزعفران و العصفر
الا اذا كان غسيلا لاينفض - و لبس الخز و القصب - و عن ابي يوسف رح
انه لا باس بلبس الخز و القصب - فان كانت المعتدة عن طلاق رجعي
لاحداد عليها - هذا اذا اكتحلت للزينة - فان اكتحلت لا للزينة كان لها
ذلك - و كذا اذا لبست الحرير و ادهنت لاجل الوجع لا للزينة *

٢٠١٢ و ان امتشطت قالوا ان امتشطت بالطرف الذي اسنانه منفرجة 2012
لا بأس به - و انما يكره الا متشاط بالطرف الاخر لان ذلك يكون للزينة *

٢٠١٣ وكذا لو لم يكن لها الا ثوب واحد كان لها ان تلبس و ان كان مصبوغا * 2013

٢٠١٤ و لو تزوج امة ثم ملكها بعد الدخول و قد ولدت منه فسد النكاح بينهما 2014
و لاحداد عليها - و ان اراد ان يزوجها غيره لايجوز حتى تحيض حيضتين
فان اعتقها كان عليها عدتان عدة فساد النكاح و فيها الحداد و عدة العتق
ولاحداد فيها - فتحد في حيضتين دون الثالثة - و لو اعتقها بعد ما حاضت

٢٠٠١ المعتدة اذا كانت في منزل ليس معها احد و هي لاتخاف من 2001
اللصوص ولا من الجيران و لكنها تفزع من امر البيت ان لم يكن
الخوف شديدا ليس لها ان تنتقل من ذلك الموضع - لان قليل الخوف
يكون بمنزلة الوحشة - و انكان الخوف شديدا كان لها ان تنتقل - لانها
لو لم تنتقل يخاف عليها من ذهاب العقل و نحوه *

٢٠٠٢ امرأة اختلعت من زوجها على نفقة عدتها و احتاجت الى الخروج 2002
لاجل النفقة تكلموا فيه - قال بعضهم لها ان تخرج بمنزلة المتوفى
عنها زوجها - و قال بعضهم ليس لها ذلك و هو المختار - لانها ابطلت
حقها عن اختيار فلم يكن ذلك لها عذرا *

٢٠٠٣ المعتدة لاتسافر لحج ولا لغيره ولا يسافر بها زوجها عندنا - و قال زفر 2003
رح فى الطلاق الرجعي له ان يسافر بها *

٢٠٠٤ و ان سافر بها و هو لايريد الرجعة لايصير مراجعا - و ان سافر بها و اشهد 2004
على الرجعة جاز له ان يسافر بها *

٢٠٠٥ و ان سافر قبل الطلاق ثم ابانها او مات عنها ان كان الى منزلها اقل 2005
من مدة السفر عادت اليه - و ان كان الى منزلها مدة سفر و الى مقصدها
اقل من مسيرة سفر مضت في سفرها - و ان كان الى كل واحد منهما
مدة سفر و كان ذلك فى المفازة سارت الى ادنى البقاع الآمنة اليها
و ان كانت في مأمن تربصت فيه عند ابيحنيفة رحمه الله تعالى - و قال
صاحباه رح اذا وجدت محرما خرجت معه الي ايهما شاءت - و انكان
الطلاق رجعيا لم تفارق زوجها على كل حال *

٢٠٠٦ وللمعتدة الخروج الى صحن الدار - فان كانت الدار مشتملة على بيوت 2006
و في كل بيت اهل لاتخرج الي صحن الدار *

البعض - لان الابراء عن النفقة بعد الطلاق لايصح كما لايصح حال قيام النكاح *

١٩٩٤ و لو صالحته عن اجر رضاع الولد بعد البينونة على شيء جاز الصلح * 1994

١٩٩٥ و ان صالحته من السكني على دراهم لايجوز * و الله اعلم * 1995

فصل فيما يحرم على المعتدة

١٩٩٦ الحرة المسلمة في عدة طلاق او فرقة سوى الموت لاتخرج ليلا و لانهارا 1996
الا لضرورة من خوف انهدام او حرق او ضياع مال *

١٩٩٧ و المتوفى عنها زوجها تخرج بالنهار لحاجتها الى النفقة * 1997

١٩٩٨ ولا تبيت الا في بيت زوجها - و عن محمد رح ان لها ان تبيت 1998
في غير بيت زوجها اقل من نصف الليل - و المعتبر في ذلك المكان
الذي تسكن فيه قبل الفرقة *

١٩٩٩ اما المتوفى عنها زوجها انكان يكفيها نصيبها من بيت الزوج بالميراث 1999
تسكن في نصيبها - فانكان في الورثة من لا يكون محرما ان امكنها ان
تستر او تاخذ بينهما و بين الورثة حجابا تسكن في ذلك - و انكان
لايكفيها كان لها ان تخرج لهذه الضرورة - و كذا اذا خافت على متاعها
في ذلك البيت - ثم لاتخرج بعد ذلك عن المكان الذي انتقلت اليه *

٢٠٠٠ و لو طلق امرأته و هي معه في الخيمة و الزوج ينتقل من موضع الى 2000
موضع الكلاء و الماء انكان لايدخل عليه ضرر بين في نفسه او في ماله
يتركها في ذلك الموضع و ليس له ان ينتقل بها ولا لها ان تنتقل من
ذلك الموضع - و انكان يدخل عليه ضرر بين في نفسه اوماله لو تركها
في ذلك الموضع كان له ان ينتقل بها بحكم الضرورة *

و هو ينكر طلاقها يلزمها عدة مستقبلة - و ان كان مقرا بالطلاق و جامعها على وجه الزنا لا تستقبل العدة *

1988 ١٩٨٨ و كذا الرجل اذا طلق امرأته جائنا او ثلثا ثم اقام معها زمانا ان اقام و هو ينكر الطلاق لا ينقضـــي عدتها - و ان اقام و هو مقر بالطـــلاق تنقضي عدتها *

1989 ١٩٨٩ رجل طلق امرأته ثلثا و كتم عن الناس فلما حاضت حيضتين وطئها فحبلت ثم اقر بطلاقها كان لها النفقة حتى تضع حملها *

1990 ١٩٩٠ رجل طلق امرأة ثلثا فتزوجت من ساعته رجلا و دخل بها الثاني ثم فرق بينهما كان عليها الاعتداد بثلث حيض منهما - و نفقتها و سكناها على الاول - بخلاف المنكوحة اذا تزوجت رجلا و دخل بها الثاني ثم فرق بينهما لا يجب على الزوج الاول نفقتها مادامت في العدة - لانه حين زوجت نفسها و وجب عليها العدة من الثاني صارت ناشزة فلا تستحق النفقة - اما المبتونة لم تمنع نفسها بالتزوج في العدة - لانها كانت ممنوعة قبل التزوج *

1991 ١٩٩١ رجل تزوج امرأة نكاحا فاسدا و دخل بها و فرق بينهما كان عليها العدة بثلث حيض من وقت الفرقة *

1992 ١٩٩٢ صغيرة بلغت فرأت يوما دما ثم انقطع حتى مضت سنة ثم طلقها زوجها كان عليها الاعتداد بثلثة اشهر - لان الدم اذا لم يستمر ثلثة ايام لايكون حيضا فبقيت من ذوات الاشهر *

1993 ١٩٩٣ رجل طلق امرأته ثم صالحته من نفقـــة العدة على شيء ان كانت عدتها بالاشهر جاز الصلح - لان زمان العدة معلوم - و ان كانت عدتها بالحيض لايجوز - لان المدة غير معلومة - و لايمكن ان يجعل الصلح ابراء عن

قالت لا لمدري كان عليها العدة من وقت الاقرار - و لها النفقة و السكنى و ان صدقته في الاسناد ذكر في الاصل ان عليها العدة من وقت الطلاق و في الفتوى عليها العدة من وقت الاقرار و لا يظهر اثر تصديقها الا في ابطال النفقة *

1982 ١٩٨٢ الحرة المطلقة اذا اقرت بانقضاء العدة بالحيض لا تصدق في اقل من شهرين هو المختار *

1983 ١٩٨٣ المرأة اذا بلغها طلاق زوجها الغائب او موته يعتبر عدتها من وقت الموت و الطلاق عندنا لا من وقت الخبر *

1984 ١٩٨٤ رجل قال لامرأته المدخولة كلما حضت و طهرت فانت طالق فحاضت ثلث حيض كانت العدة عليها من وقت الطلاق الاول *

1985 ١٩٨٥ امرأة الغائب اذا اخبرها رجل بموته و اخبرها رجلان بحياته فان كان الذي اخبرها بموته شهد انه عاين موته او جنازته و كان عدلا وسعها ان تعتد و تتزوج - هذا اذا لم يؤرخا - فان ارخا و تاريخ شهود الحياة متاخر فشهادتهما اولى *

1986 ١٩٨٦ رجل تزوج امرأة و دخل بها ثم قال كنت حلفت ان تزوجت ثيبا قط فهي طالق ثلثا و لم اعلم انها ثيب يقع الطلاق باقراره - ثم ان صدقته المرأة كان لها نصف المهر بالطلاق قبل الدخول و مهر المثل بالدخول - و عليها العدة بهذا الوطئ - و لا نفقة لها لانها قد صدقته في وقوع الطلاق قبل الدخول - و ان كذبته المرأة في اليمين فلها مهر واحد - و لها النفقة و السكنى - لانها تزعم ان الطلاق وقع عليها باقراره بعد الدخول *

1987 ١٩٨٧ رجل طلق امرأته ثلثا فلما اعتدت حيضتين جامعها مكرها ان جامعها

ثلث حيض - و قال الشافعي رح حيضة واحدة - و ان كانت لاتحيض فثلثة اشهر - و ان كانت حاملا فبوضع الحمل *

1976 ١٩٧٦ و لو قبلت ابن مولاها فكذلك اذا مات المولى *

1977 ١٩٧٧ و ان مات زوج ام ولد ومولاها و بين موتهما اقل من شهرين و خمسة ايام و لا يعلم ايهما مات اولا اعتدت اربعة اشهر و عشرا - و ان كان بين موتهما شهران و خمسة ايام او اكثر اعتدت اربعة اشهر و عشرا و ثلث حيض - و ان لم يعرف مابين موتها يجمع بين عدة الوفاة و ثلث حيض في قول ابي يوسف و محمد رح - و قال ابو حنيفة رح تعتد اربعة اشهر و عشرا و لا يشترط فيها الحيض - و ان كان الطلاق رجعيا ثم مات المولى فكذلك و لا ترث هذه المرأة من زوجها *

1978 ١٩٧٨ و قد يجب على المرأة اربع عدد - صورتها الامة الصغيرة طلقها زوجها رجعيا فانها تعتد بشهر و نصف - فان بلغت في العدة و حاضت ينقلب عدتها الى حيضتين - فان اعتقها المولى في العدة تصير عدتها ثلث حيض - فان مات زوجها المطلق في العدة ينقلب عدتها اربعة اشهر و عشرا *

1979 ١٩٧٩ الكتابية اذا كانت تحت مسلم فعدتها عدة المسلمة في الطلاق والوفاة الحرة كالحرة و الامة كالامة - و ان كانت تحت ذمي فلا عدة عليها في الموت و الفراق في قول ابي حنيفة رحمة الله تعالى الا ان تكون حاملا فتمنع من الزوج حتى تضع حملها - و قال ابو يوسف و محمد رح عليها العدة *

1980 ١٩٨٠ المهاجرة لا عدة عليها *

1981 ١٩٨١ رجل اقرانه طلق امرأته منذ خمس سنين ان كذبته في الاسناد او

1968 ١٩٦٨ و لو اعتدت الآيسة بالاشهر ففرغت من العدة و تزوجت بزوج آخر ثم حاضت لو ولدت فعلى القول الذي للاياس حد مقدر و ما ترى من الدم لا يكون حيضا لا يفسد نكاحها مع الثاني - و على القول الذي ليس للاياس حد مقدر و ما ترى الآيسة من الدم يكون حيضا يفسد نكاحها مع الثاني *

1969 ١٩٦٩ رجل طلق منكوحته الامة ثم عتقت في العدة فان كان الطلاق رجعيا تستكمل عدة الحرائر عندنا - لانه ازداد حالها حال بقاء النكاح فازداد العدة و في الطلاق البائن لا يزداد عدتها بالعتق - و عند الشافعي رح لا يتغير عدتها في الوجهين *

1970 ١٩٧٠ و ان مات زوج الامة و عتقت في عدة الوفاة فعدتها شهران و خمسة ايام لا تتغير كمالا تتغير بالعتق في الطلاق البائن *

1971 ١٩٧١ و الحرة المطلقة اذا مات زوجها في العدة ان كان الطلاق رجعيا ينقلب عدتها عدة الوفاة - و ان كانت مبتوتة فان كانت لا ترث زوجها لا ينقلب عدتها عدة الوفاة - و ان كانت ترث تجمع بين الاشهر و الحيض *

1972 ١٩٧٢ المتوفى عنها زوجها اذا ولدت لاكثر من سنتين من وقت الموت يحكم بانقضاء عدتها قبل الولادة بستة اشهر و زيادة فيجعل كانها تزوجت بزوج آخر بعد انقضاء العدة وحبلت من الثاني *

1973 ١٩٧٣ ام ولد مات مولاها و هي في نكاح رجل لايلزمها عدة موت المولى- فان طلقها زوجها بعد موت المولى كان عليها عدة الحرائر *

1974 ١٩٧٤ و ان اعتقها و هي في العدة عن طلاق رجعي تتغير عدتها - و ان كان الطلاق بائنا لاتتغير *

1975 ١٩٧٥ فان انقضت عدة طلاقها ثم مات المولى كان عليها عدة موت المولى

في مرضه و مات قبل انقضاء العدة كان عليها الاعتداد باربعة لشهر و عشر يستكمل فيها ثلث حيض *

١٩٦٤ العدتان تنقضيان بمدة واحدة عندنا كانتا من جنس واحد او من 1964
جنسين - صورة الاولى المطلقة اذا حاضت حيضة ثم تزوجت بزوج آخر و وطئها الثاني ففرق بينهما فحاضت حيضتين بعد التفريق كان لهـــذا الزوج الثاني ان يتزوجها لانقضاء عدة الاول - و ليس لغيره ان يتزوجها حتى تحيض ثلث حيض من وقت التفريق لقيام عدة الثاني في حق غيره - و ان كان طلاق الاول رجعيا كان للاول ان يرجعها قبل ان تحيض حيضتين بعد تفريق الثاني - لانها في عدة الاول و لا يطأها حتى تنقضي عدة الثاني - و ان حاضت ثلث حيض من وقت تفريق الثاني تنقضي العدتان جميعا - و صورة الثانية المتوفى عنها زوجها اذا وطئت بشبهة تنقضي العدتان الاولى باربعة اشهر و عشر و الثانيـــة بثلث حيـــض تراها في الاشهر *

فصل في انتقال العدة

١٩٦٥ المطلقة الصغيرة اذا اعتدت و بلغت في خلال العدة فانها تستقبل 1965
العدة بثلث حيض مبتوتة كانت او رجعية *

١٩٦٦ و كذا الآيسة اذا اعتدت ببعض الشهور ثم حاضت او حبلت تستقبل 1966
العدة في الحيض بثلث حيض و في الحبل بوضع الحمل *

١٩٦٧ و لو اعتدت المطلقة بحيضة او حيضتين ثم ارتفع حيضها لا تخرج من 1967
العدة ما لم تيأس - فاذا ايست استقبلت العدة بالاشهر *

ليال - لان الله تعالي ذكر العشر منكرا و جمع الليالي يذكر بلفظ التذكير و جمع الايام يذكر بلفظة التانيث فعلي قوله يزيد عدتها بليلة واحدة و هذا اقرب الى الاحتياط *

1957 ١٩٥٧ فان كانت المرأة امة فعدتها شهران و خمسة ايام *

1958 ١٩٥٨ و ان كانت حاملا فعدتها بوضع الحمل حرة كانت او امة *

1959 ١٩٥٩ صبي مات و امرأته حامل ظهر حبلها كانت عدتها بوضع الحمل استحسانا - و قال الشافعي رح تعتد بالشهور و هو رواية عن ابي يوسف رح - و لو حبلت بعد موته تعتد بالشهور في قولهم *

1960 ١٩٦٠ و المتوفى عنها زوجها و قد طلقها زوجها ان كانت ترث زوجها المطلق تعتد بابعد الاجلين - و تفسير ذلك انها تعتد اربعة اشهر و عشرا فيها ثلث حيض - حتى لو اعتدت اربعة اشهر و عشرا و لم تحض كانت في العدة ما لم تحض ثلث حيض - و لو حاضت ثلث حيض قبل تمام اربعة اشهر و عشرا لا ينقضي عدتها حتى يتم المدة - و قال ابو يوسف رح ينقضي عدة امرأة الغار بثلث حيض - و سنذكر مسائل الغرار بعد هذا في فصل على حدة *

1961 ١٩٦١ و كذا الرجل اذا طلق احدى امرأتيه بعينها بعد ما دخل بهما و هما من ذوات الحيض ثم مات و لا يعرف المطلقة يجب على كل واحدة منهما عدة الوفاة يستكمل فيها ثلث حيض *

1962 ١٩٦٢ و كذا لو طلق احد امرأتيه ثلثا بغير عينها في صحته ثم مات قبل البيان يجب على كل واحدة منهما عدة الوفاة يستكمل فيها ثلث حيض *

1963 ١٩٦٣ و كذا لو قال لامرأتين له احداكما طالق ثلثا ثم بين الطلاق في احداهما

1951 و ان ولدت ولدين في بطن واحد ليس بينهما ستة اشهر تنقض عدتها بالولد الثاني لا بالاول *

1952 و ان كانت المعتدة مملوكة امة او مدبرة او مكاتبة اوام ولد و هي من ذوات الحيض فعدتها في الطلاق و الوطي حيضتان - و ان كانت من ذوات الاشهر فعدتها شهر و نصف شهر - و ان كانت حاملا فعدتها بوضع الحمل *

1953 و ام الولد اذا اعتقها مولاها او مات عنها تعتد بثلث حيض *

1954 و ان خرمت على مولاها بسبب لا يجب عليها العدة حتى تعتق لكن يزول فراش المولى عنها بالحرمة - حتى لو ولدت ولدا لستة اشهر من وقت الحرمة لا يثبت النسب من المولى ما لم يدع *

1955 مكاتب اشترى منكوحته لا يفسد النكاح - فان عجز المكاتب بقيا على النكاح - لانهما صار ملكا للمولى - و ان ادى الكتابة فعتق يفسد النكاح و لا عدة عليها - لانها تحل لزوجها بملك اليمين - و ان مات المكاتب بعد ما اشتراها ان مات عاجزا تبطل الكتابة و يصيران مملوكين للمولى - فهذا رجل مات عن امرأته الامة فيلزمها الاعتداد بشهرين و خمسة ايام دخل بها او لم يدخل - و ان مات المكاتب عن وفاء فسد النكاح - لانه يعتق في آخر جزء من اجزاء حيوته و يملك رقبة امرأته - فان لم يكن دخل بها فلا عدة عليها - و ان كان دخل بها ان كانت ولدت منه تعتد بثلث حيض - لانها ام ولد عتقت بموت السيد - و ان لم تكن ولدت منه كان عليها الاعتداد بحيضتين - لان النكاح فسد بينهما قبل الموت *

1956 و عدة الوفاة على الحرة اربعة اشهر و عشرا - و حكي عن الشيخ الامام الاجل ابي بكر محمد بن الفضل رح انه قال تعتد اربعة اشهر و عشر

١٩٤٢ و عدة الطلاق تارة تكون بالحيض و تارة تكون بالشهور و تارة تكـــون 1942
بوضع الحمل *

١٩٤٣ فان طلقها في حيضها كان عليها الاعتداد بثلث حيض كوامل و لا 1943
تحتسب هذه الحيضة من العدة كما لا تحتسب من الاستبراء *

١٩٤٤ و لو كان النكاح فاسدا ففرق القاضي بينهما ان كان فرق قبل الدخول 1944
لا تجب العدة - و كذا لو فرق بعد الخلوة - و ان فرق بعد الدخول كان
عليها الاعتداد من وقت الفرقة لا من وقت الوطي - و كذا لو كانت
الفرقة بغير قضاء *

١٩٤٥ و لو كانت المطلقة صغيرة او آيسة و هي حرة فعدتها ثلثة اشهر * 1945

١٩٤٦ و اختلفوا في حد الاياس - قال بعضهم ان كانت بنت خمس و خمسين 1946
سنة و لا تحيض فهي آيسة رومية كانت او غير رومية و عليه الفتوى *

١٩٤٧ و التي لم تحض قط فهي بمنزلة الصغيرة تعتد بالاشهر * 1947

١٩٤٨ فان طلقها زوجها غرة الشهر تعتد ثلثة اشهر بالاهلة - و ان طلقها في خلال 1948
الشهر قال ابو حنيفة رحمه الله تعالى تعتد ثلثة اشهر بالايام كل شهر ثلثون
يوما - و قال صاحباه رح تعتد بعد ما مضت بقية الشهر الذي طلقها فيه
شهرين بالاهلة و يكمل الشهر الاول ثلثين يوما بالشهر الآخر - و جنس
هذه المسائل كثيرة *

١٩٤٩ و ان كانت المعتدة عن الطلاق او الوطي عن شبهة او الموت حاملا 1949
فعدتها بوضع الحمل سواء كانت حاملا وقت وجوب العدة او حبلت
بعد الوجوب *

١٩٥٠ فان خرج منها اكثر الولد قالوا ان كان الطلاق رجعيا ينقطع حق 1950
الرجعة و لا يحل لها ان تتزوج احتياطا *

من الغد ولدا آخر لزمه الولدان جميعا - و اللعان ماض - فان قال بعد ذلك هما ابناي كان صادقا و لا حد عليه *

1932 ١٩٣٢ و ماداما المتلاعنان على اللعان ليس له ان يتزوجها - فان اكذب المتلاعن نفسه بعد اللعان كان له ان يتزوجها في قول ابي حنيفة و محمد رح *

1933 ١٩٣٣ و كذا لو صارت المرأة بعد اللعان بصفة لو كانت عليها لا يجري اللعان بينهما بان زنت او ما اشبه ذلك كان له ان يتزوجها *

1934 ١٩٣٤ و لو صدقت المرأة زوجها قبل اللعان سقط اللعان و لا يجب الحد *

1935 ١٩٣٥ و اذا لعن الزوج ثلث مرات و المرأة كذلك ففرق القاضي بينهما جاز تفريقه و يقام الاكثر مقام الكل و يكون تاركا للسنة *

1936 ١٩٣٦ و ان فرق قبل اكثر اللعان بينهما كانت الفرقة باطلة * والله اعلم *

باب العدة

1937 ١٩٣٧ العدات ثلث المطلقة و الموطوءة عن شبهة و المتوفى عنها زوجها *

1938 ١٩٣٨ و الاعتداد قد يكون بالحيض و قد يكون بالاشهر و قد يكون بوضع الولد او باسقاط سقط استبان خلقه او بعض خلقه *

1939 ١٩٣٩ اما المطلقة - رجل تزوج امرأة نكاحا جائزا و طلقها بعد الدخول او بعد الخلوة الصحيحة كان عليها العدة *

1940 ١٩٤٠ و تفسير الخلوة الصحيحة مرفي كتاب النكاح *

1941 ١٩٤١ و ان كانت الخلوة فاسدة فان كان الفساد لامر شرعي مع التمكن من الوطي حقيقة كصوم الفرض و صلوة الفرض و الاحرام كان عليها العدة - و ان كان الفساد لعجزه عن الوطي حقيقة لا يجب عليها العدة - و كذا لو طلقها قبل الخلوة *

فهي امرأته - و ان رفعت الامر الى القاضي يبدأ القاضي بالرجل
فيحلفه كما ذكر الله تعالى في كتابه - و روى الحسن رح عن ابي حنيفة
رحمه الله تعالى انه يشترط لفظة المواجهة فيقول فيما رميتك من الزنا - و
ذكر الكرخي رح اذا ذكر لفظ المغائبة و اشار كفى - ثم يحلف المرأة *
١٩٢٧ و ايهما نكل عن اللعان يحبسه القاضي حتى يلتعن كما التعن صاحبه 1927
وقال الشافعي رح اذا امتنعت المرأة بعد لعان الزوج يقام عليها حد الزنا *
١٩٢٨ و ان ادعت المرأة على زوجها القذف و انكر الزوج فاقامت البينة 1928
على القذف لاعن القاضي بينهما عندنا - لان الثابت بالبينة
كالثابت عيانا *
١٩٢٩ و اذا التعنا و فرغا من اللعان فرق القاضي بينهما و يكون طلاقا - و لها 1929
النفقة و السكنى ما دامت في العدة - و ما لم يفرق القاضي بينهما
فهي امرأته عندنا *
١٩٣٠ و اذا نفى الرجل حبل امرأته و قال هو من الزنا عندنا لا يجب 1930
عليه حد و لا لعان في الحال - فان جاءت بولد لستة اشهر فكذلك
لاحتمال ان الولد حدث بعد النفي - و ان جاءت به لاقل من ستة
اشهر فكذلك في قول ابي حنيفة رحمه الله تعالى - و في قول صاحبيه
رح لاعن القاضي بينهما و يلزم الولد امه *
١٩٣١ امرأة ولدت ولدين في بطن واحد فاقر الزوج بالاول و نفى الثاني 1931
يلزمه الولد و ان يلاعنها - و ان نفي الاول و اقر بالثاني لزماه - و عليه
حد القذف - و ان نفاهما ثم مات احدهما قبل اللعان لاعن على الحي
و هما ولداه - و كذا لو ولدت ولدين احدهما ميت فنفاهما لزماه و لا عن
على الحي منهما - و ان ولدت ولدا فنفاه و لاعن القاضي بينهما ثم ولدت

فصل فى اللعان

1919 اللعان لا يجري الا بين زوجين حرين مسلمين عاقلين بالغين غير
محدودين في قذف - لان اللعان عندنا شهادات مؤكدات بالايمان - فلا
يجري اذا لم يكونا من اهل الشهادة او لم يكن احدهما من اهل الشهادة
و مع اهلية الشهادة يراعي العفة و الاحصان في جانب المرأة *

1920 و يجري اللعان بين الفاسقين و الاعميين - لانهما من اهل الشهادة
ينعقد النكاح بحضرتهما *

1921 و سبب اللعان قذف الزوجة قذفا يوجب الحد في الاجانب *

1922 فاذا تحقق السبب و امتنع اللعان لمعنى من قبل المرأة بان كان
الزوج حرا عاقلا مسلما بالغا غير محدود في القذف و المرأة امة او
كافرة او صغيرة او مجنونة او خرساء او غير عفيفة او موطوءة بشبهة
لا يجري اللعان و لا يجب حد القذف على الرجل - و ان امتنع اللعان
لمعنى من قبل الزوج ان كان الزوج اهلا لوجوب الحد كان عليه حد
القذف - لان اللعان في جانبه - قائم مقام حد القذف و هو قائم مقام
حد الزنا في جانب المرأة - و ان كانا محدودين في قذف كان عليه
حد القذف *

1923 و ان لم يكن الرجل اهلا لوجوب الحد عليه كما لا يجب اللعان لا يجب الحد

1924 و لو اجتمع شرائط اللعان فيهما ثم طلقها بائنا او ثلثا سقط اللعان و لا
يجب الحد - و كذا لو تزوجها بعد ذلك - و ان طلقها رجعيا لايسقط اللعان *

1925 و صورة اللعان مانص الله تعالى في كتابه *

1926 رجل قذف امرأته و هما من اهل اللعان و لم ترفع الامر الى القاضي

1910 حربية خرجت الينا مسلمة و ترك زوجها الحربي في دار الحرب وقعت الفرقة بينهما *

1911 و كذا لو خرج الحربي الينا مسلما و ترك امرأة كافرة في دار الحرب يجب عليها العدة الا انها لو خرجت مسلمة مراغمة فلا عدة عليها في قول ابي حنيفة رحمه الله تعالى - و قال صاحباه رح يجب عليها العدة *

1912 و كذا لو خرج احدهما ذميا يقع الفرقة *

1913 و لو خرج احدهما مستأمنا لا يقع الفرقة *

1914 و لو خرجا باماني فاسلمت المرأة في رواية هي امرأته حتى تحيض ثلث حيض - و في رواية يعرض الاسلام على الزوج فان ابي فرق بينهمـــا - و لو لم يعرض الامام الاسلام عليه لا يقع الفرقة حتى تحيض ثلث حيض *

1915 اذا اسلم احد الزوجين في دار الحرب يتوقف الفرقة بينهما على مضي ثلث حيض *

1916 ذمية اسلمت في دار الاسلام يعرض الاسلام على زوجها فان اسلم - و الا فرق القاضي بينهما و يكون طلاقا في قول ابي حنيفة و محمد رحمهما الله تعالى - و قال ابو يوسف رح لا يكون طلاقا *

1917 و لو اسلم الزوج و امرأته حربية او مجوسية يعرض الاسلام عليها - فان اسلمت - و الا فرق بينهما و لا يكون طلاقا - و لو كانت كتابية يبقى النكاح بينهما على حاله *

1918 و ردة احد الزوجين لا تكون طلاقا - و قال محمد رح ردة الزوج طلاق قياسا على اباء الزوج - و الله اعلم *

و لا تصف تبين من زوجها كانها ارتدت - و لهذا اختار الاتقياء و الصلحاء استيصاف المرأة و هو حسن - لكن ينبغي ان يكون الاستيصاف على وجه الاستفهام تيسيرا للوصف عليها - فان قالت انا اعقل الاسلام و اقدر على الوصف و لا اصف قالوا تبين من زوجها - لانها تركت ركن الاسلام و هو الاقرار باللسان عند الحاجة من غير عذر فتكون مرتدة - فان قالت انا اعقل الاسلام و لا اقدر على الوصف اختلفوا فيه - قال بعضهم تبين من زوجها لان الجهل ليس بعذر - و قال بعضهم لا تبين لان ردة السكران لا تصح استحسانا مع ان سببها معصية باشرها عن اختيار فلان لا تعتبر ردة هذه كان اولى *

١٩٠٥ الصبي الذي يعقل ارتداده يصح - و يوجب الفرقة في قول ابي حنيفة 1905
و محمد رحمهما الله تعالى - و كذا ارتداد الصبية التي تعقل *

١٩٠٦ اذا بلغ الصبي عاقلا و هو لا يصف الاسلام يكون مرتدا الا انه لا يقتل 1906
كالمكره على الاسلام اذا اسلم ثم ارتد يصح ردته و لا يقتل *

١٩٠٧ صبي نصراني زوجه ابوه نصرانية فاسلمت المرأة لا يفرق القاضي 1907
بينهما حتى يعقل الصبي الاسلام - فاذا عقل يعرض عليه الاسلام فان ابى فرق القاضي بينهما كما لو كان بالغا يعرض الاسلام عليه فان ابى فرق بينهما *

١٩٠٨ زوجان مسلمان ارتدا معا لم يقع الفرقة بينهما استحسانا حتى لو اسلما 1908
كان النكاح قائما بينهما *

١٩٠٩ الذمي اذا انتقل من دين الى دين لا يتعرض له - و قال الشافعي 1909
رح يؤمر ان يسلم او يعود الى دينه الاول - فان لم يفعل حتى مضت ثلث حيض تبين امرأته *

١٨٩٧ و كذا لو آلى منها و لحق بدار الحرب ثم انقضت مدة الايلاء 1897
لا يقع الطلاق *

١٨٩٨ و لو طلقها بعد اللحاق بدار الحرب لا يقع الطلاق - فان عاد الى دار الاسلام 1898
مسلما و هي في العدة و طلقها بعد ما خرج من دار الحرب لا يقع
الطلاق في قول ابي يوسف رح الآخر - و يقع في قوله الاول و هو
قول محمد رح *

١٨٩٩ و المرأة اذا ارتدت و العياذ بالله و لحقت بدار الحرب فطلقها زوجها 1899
ثم عادت الى دار الاسلام مسلمة لا يقع الطلاق في قول ابي حنيفة رح
لسقوط العدة عنها باللحوق بدار الحرب - و في قول صاحبيه رح يقع الطلاق
لبقاء العدة - و انما لا يقع قبل العود الى دار الاسلام لاختلاف الدارين *

١٩٠٠ الصغيرة المسلمة اذا كانت تحت زوج ارتد ابواها عن الاسلام و 1900
العياذ بالله لم تبن من زوجها - فان لحقا بها بدار الحرب بانت - و ان
ارتدت الام و العياذ بالله و لحق بها بدار الحرب و امها ماتت في دار
الاسلام مسلمة او مرتدة لم تبن الصغيرة من زوجها *

١٩٠١ نصرانية صغيرة تحت مسلم تمجس ابوها و امها نصرانية قد ماتت 1901
او هي حية لم تبن الصغيرة من زوجها - و لو تمجس الابوان بانت من
زوجها و ان لم يلحقا بها بدار الحرب *

١٩٠٢ مسلمة بالغة تحت مسلم صارت معتوهة فارتد الابوان و لحقا بها 1902
بدار الحرب لم تبن من زوجها *

١٩٠٣ مسلم تزوج نصرانية صغيرة لها ابوان نصرانيان فبلغت و هي لا تعقل 1903
النصرانية و لا دينا من الاديان و لا تصف بانت من زوجها *

١٩٠٤ و كذا الصغيرة المسلمة باسلام الابوين اذا بلغت و هي لا تعرف الاسلام 1904

قول محمد رح و ابي يوسف الاول رح - ثم رجع ابو يوسف رح عن هذا و قال لا يقع و هو قول زفر رح و عليه الفتوى *

١٨٨٩ رجل قال لامرأته الامة انت طالق للسنة ثم اشتراها فجاء وقت 1889
السنة لا يقع الطلاق *

١٨٩٠ و كذا لو آلى منها ثم اشتراها فانقضت مدة الايلاء * 1890

١٨٩١ و كذا لو علق طلاقها بشرط ثم وجد الشرط بعد ما ملكها لا يقع الطلاق * 1891

١٨٩٢ و لو اعتقها بعد ما اشتراها ثم جاء وقت السنة لو انقضت مدة 1892
الايلاء او وجد الشرط يقع الطلاق في قول محمد رح - و في قياس قول ابي يوسف رح لا يقع و عليه الفتوى *

١٨٩٣ حرة اشترت زوجها او شيئا منه بطل النكاح - فان اعتقت زوجها ثم 1893
طلقها و هي في العدة لا تطلق في قول ابي يوسف رح الآخر - و تطلق في قوله الاول و هو قول محمد رحمه الله تعالى *

١٨٩٤ و لو قال العبد لامرأته الحرة انت طالق للسنة ثم ملكت زوجها 1894
فجاء وقت السنة يقع عليها الطلاق - لان الحرة لا تحل لعبدها فيظهر وجوب العدة و تكون محلا للطلاق بخلاف الفصل الاول *

١٨٩٥ منكوحة ارتدت و العياذ بالله حكي عن ابي نصر و ابي القاسم الصفار 1895
رح انهما قالا لا يقع الفرقة بينهما حتى لا تصل الى مقصودها ان كان مقصودها الفرقة - و في الروايات الظاهرة يقع الفرقة و تحبس المرأة حتى تسلم - و يجدد النكاح سدا لهذا الباب عليها *

١٨٩٦ رجل علق طلاق امرأته بدخول الدار ثم ارتد و العياذ بالله 1896
و لحق بدار الحرب فدخلت الدار لا يقع الطلاق عليها في قول ابي حنيفة رحمه الله تعالى *

١٨٨٢ رجل آلى من امرأته ثم طلقها ثم تزوجها ان تزوجها قبل انقضاء العدة 1882
كان الايلاء على حاله - حتى لو تمت اربعة اشهر من وقت الايلاء يقع عليها
تطليقة اخرى بحكم الايلاء - و ان تزوجها بعد ما طلقها بعد انقضاء العدة
كان موليا - لكن يعتبر مدة الايلاء من وقت التزوج *

١٨٨٣ رجل آلى من امرأته بعد ما طلقها تطليقة بائنة لا يكون موليا * 1883

١٨٨٤ رجل آلى من امرأته و بينه و بينها مسيرة اربعة اشهر او اكثر او هو 1884
مريض لا يقدر على الجماع كان فيئه باللسان عندنا يقول فئت اليها - فان
فاء بلسانه ثم برأ في اربعة اشهر يبطل ذلك الفيء و لا يكون
فيئه الا بالجماع *

١٨٨٥ و ان كان المولي محبوسا بحق لا يعتبر الفيء باللسان - و ان كان محبوسا 1885
ظلما بغير حق جاز ان يكون فيؤه باللسان و يكون بمنزلة الغائب والمريض *

١٨٨٦ و لو فاء المريض بقلبه لا بلسانه لا يعتبر * 1886

١٨٨٧ المولي اذا جامع امرأته فيما دون الفرج لم يكن ذلك فيئا والله اعلم * 1887

فصل في الفرقة بين الزوجين بملك احدهما صاحبه و بالكفر

١٨٨٨ رجل اشترى امرأته او شيئا منها بطل النكاح - فان طلقها قبل ان 1888
يمضي مدة تنقضي فيها العدة لا يقع الطلاق - لان الطلاق لا يقع الا في
النكاح او في عدة النكاح و المملوكة تحل لمولاها بملك اليمين فلم يكن
عليها العدة لا لحق المولى و لا لحق الشرع - و لو اعتقها بعد ما اشتراها
ثم طلقها قبل ان يمضي مدة تنقضي فيها العدة يقع طلاقه عليها في

١٨٧٧ رجل قال لامرأته اگر تو اندر نائي مرا فانت طالق و اراد به خطر 1877
الجماع على نفسه يكون موليا - و ان لم يرد به خطر الجماع و انما اراد به
انه لا حاجة له الى جماعها لايكون موليا - و كذا لو لم ينو شيئا
لايكون موليا *

١٨٧٨ رجل آلى من امرأته ثم قال(٢) اشركت في ايلائك هذه لامرأة له اخرى 1878
لايكون موليا من الثانية - و لو اشركها في الظهار صح اشراكه - لان الكلام
الاول قد تم فلا يملك تغييره - و في الظهار باشراك الثانية لا يتغير حكم
الاول و في الايلاء يتغير - لانه لو صح الاشراك في الايلاء يتعلق الحنث
بقربانهما جميعا فلا يصح اشراكها(٣) *

١٨٧٩ رجل قال لامرأتين له و الله لا اقربكما يكون موليا منهما - حتى لو مضت 1879
اربعة اشهر و لم يقرب يقع على كل واحدة تطليقة - و لو قال و الله
لا اقرب واحدة منكما كان موليا من واحدة - حتى لو مضت اربعة اشهر
يقع الطلاق على احدهما *

١٨٨٠ رجل آلى من امرأته ثم طلقها ثلثا ثم تزوجها بعد زوج آخر لا يكون موليا 1880
و ليس الايلاء كالظهار - لان الايلاء تعليق الطلاق بعدم القربان فيتقيد بالملك
القائم و بالطلقات الثلث يبطل ذلك الملك - بخلاف الظهار لانه تحريم
الى غاية وليس بطلاق - وعلى قول زفر رح لا يبطل الايلاء بالطلقات الثلث *

١٨٨١ رجل آلى من امرأته ثم طلقها تطليقة بائنة ان مضت اربعة اشهر 1881
من وقت الايلاء و هي في العدة طلقت اخرى بالايلاء - و ان انقضت
عدتها ثم تمت مدة الايلاء لا يقع الطلاق بالايلاء - فعدة الطلاق و مدة الايلاء
كفرسي رهان ايهما سبق كان الحكم له *

(٢ ن) ثم قال لها اشركت * (٣ ن) اشراكه *

عليها الطلاق بحكم ذلك الايلاء و ان كانت في العدة مالم يتزوج - و ههنا
و ان تكرر الكلام الا ان مدة الكل واحدة و في المـــدة الواحدة لايقع
الا طلاق واحد *

1872 ١٨٧٢ و لو قال لها ان قربتك الى سنة فانت طالق ثلثا و اراد حيلة ان
لايقع الثلث فالحيلة له ان يدعها اربعة اشهر حتى تبين بتطليقة ثم
يمكث ثمانية اشهر تمام السنة ثم يتزوجها نكاحا مستقبلا فاذا قربها لاتطلق
فلايقع الثلث - لانها لا تطلق ثلثا قبل السنة لعدم القربان و بعد تمام السنة
لايبقى اليمين *

1873 ١٨٧٣ و لو قال لها ان قربتك ابدا فانت طالق ثلثا فلا حيلة له في هذا - لانه
ان قربها تطلق ثلثا - وان لم يقربها يقع عليها بمضي اربعة شهر تطليقة فاذا
تزوجها بعد ذلك يكون موليا *

1874 ١٨٧٤ رجل قال لامرأته و الله لا اقربك سنة فمضت اربعة اشهر و بانت
بتطليقة ثم تزوجها فمضت اربعة اشهر اخرى من وقت التزوج يقع عليها
تطليقة اخرى - لان اليمين باقية - فان تزوجها مرة اخرى و مضت
اربعة اشهر اخرى لايقع عليها طلاق آخر - لان اليمين كانت موقتة الى
سنة و لم يبق بعد هذا التزوج الى تمام السنـــة اربعة اشهر فلايقع
عليها طلاق آخر *

1875 ١٨٧٥ رجل قال لامرأته ان قربتك فعبدي هذا حر فمضت اربعة اشهر
و خاصمته الى القاضي ففرق بينهما ثم اقام العبد البينة انه حر الاصل
فان القاضي يقضي بحريته و يبطل الايلاء و ترد المرأة الى زوجها - لانه
تبين انه لم يكن موليا *

1876 ١٨٧٦ رجل قال لامرأته و الله لا اقربك في هذا البيت لايكون موليا *

١٨٦٥ ولا يكون موليا الا بالحلف على الجماع في الفرج - فان كان يحلف 1865
بدون الجماع في الفرج لا يكون موليا *

١٨٦٦ رجل قال لامرأته و الله لايمس جلدي جلدك لا يكون موليا - لانه 1366
يحنث في يمينه بالمس بدون الجماع في الفرج *

١٨٦٧ ولو قال لايمس فرجي فرجك يكون موليا لانه يراد بهذا الكلام الجماع * 3867

١٨٦٨ و لو قال اگر با تو خسپم فانت طالق و لم ينو شيدا يكون موليا - لان 1868
مراد الناس من هذا الجماع - فان نوى المضاجعة لايكون موليا - فان
ضاجعها و لم يجامعها كان حانثا *

١٨٦٩ و لو قال اگر من دست بزن فراز كنم تا يكسال فعلي كذا و لم يقربها 1869
اربعة اشهر تبين بتطليقة - لانه يراد به في العرف الجماع - ولهذا لو جامعها
في السنة فيما دون الفرج لايحنث في يمينه *

١٨٧٠ و لو قال لامرأته ان قربتك او دعوتك الى فراشي فانت طالق لايكون 1870
موليا - لانه يمكنه قربانها من غير وقوع الطلاق بان يدعوها الى الفراش
فيحنث ثم يقربها بعد ذلك من غير ان يحنث بالقربان *

١٨٧١ و لو قال لامرأته ان اغتسلت من جنابتي ما دمت امرأتي فانت 1871
طالق ثلثا و اعاد هذا القول وكانت المرأة حاملا و لم يقربها بعد هذه
المقالة حتى وضعت حملها بعد اربعة اشهر فصاعدا فانها تبين بواحدة
عند انقضاء اربعة اشهر - لانه كان موليا وينقضي عدتها بوضع الحمل - فان
تزوجها بعد ذلك لايكون موليا - و لو قربها لايحنث - لان اليمين كانت
موقتة الى بقاء النكاح وبعد ما وقعت تطليقة بالايلاء لا يقع عليها طلاق آخر
و ان (٢) مضت مدة ايلاء اخرى قبل وضع الحمل - لان المبانة بالايلاء لايقع

(٢ ن) و ان مضت اربعة اشهر اخرى الى سنة قبل وضع الحمل *

فبانت منه ثم دخلت الدار في العدة لا يلزمه الظهار - لانه لو نجز الظهار في هذه الحالة لا يصح فكذا اذا صار المعلق منجزا عند الشرط *

1858 ١٨٥٨ و كفارة الظهار مذكورة في كتاب الله تعالى *

1859 ١٨٥٩ المظاهر اذا لم يكفر و رفع الامر الى القاضي يحبسه القاضي حتى يكفر او يطلق - والله اعلم *

باب الايلاء

1860 ١٨٦٠ الايلاء منع النفس عن قربان المنكوحة منعا مؤكدا باليمين بالله تعالى او غيره من طلاق اوعتاق او صوم او حج و نحو ذلك مطلقا او موقتا باربعة اشهر في الحرائر و شهرين في الاماء من غير ان يتخللها وقت يمكنه قربانها فيه من غير حنث - فان تخلل لا يكون موليا - و صورة ذلك ان يقول للحرة و الله لا اقربك اربعة اشهر الا يوما او قال سنة الا يوما فانه لايكون موليا ما لم يوجد اليوم المستثنى - و كذا لو قال و الله لا اقربك حتى يقدم فلان لا يكون موليا - لانه يتوهم قدومه في المدة *

1861 ١٨٦١ و كذا لو قال و الله لا اقربك حتى تموتي او يموت فلان لا يكون موليا لاحتمال ان يموت فلان في المدة *

1862 ١٨٦٢ و لو حلف لا يقربها حتى يخرج الدجال او حتى تطلع الشمس من مغربها يكون موليا استحسانا *

1863 ١٨٦٣ و لو قال و الله لا اقربك حتى اعتق عبدي هذا او حتى اطلق فلانة يكون موليا في قول ابي حنيفة و محمد رحمهما الله تعالى *

1864 ١٨٦٤ و لو قال و الله لا اقربك حتى تموتي لو حتى اموت او حتى تقتلي او حتى اقتل يكون موليا *

١٨٥٠ و ظهار الاخرس بالكتاب و الاشارة المعروفة لازم * 1850

١٨٥١ و لو ظاهر موقتا بان قال انت علي كظهر امي اليوم او الشهر او السنة 1851
يصير مظاهرا في الحال فاذا مضى ذلك الوقت بطل *

١٨٥٢ و لو قال لاجنبية اذا تزوجتك فانت علي كظهر امي فتزوجها 1852
يكون مظاهرا *

١٨٥٣ و لو قال اذا تزوجتك فانت طالق ثم قال اذا تزوجتك فانت علي 1853
كظهر امي فتزوجها يلزمه الطلاق و الظهار جميعا - لانهما يقعان في
حالة واحدة - و كذا لو قال اذا تزوجتك فانت علي كظهر امي و انت
طالق فتزوجها لزماه جميعا - و لو قال اذا تزوجتك فانت طالق و انت
علي كظهر امي فتزوجها يقع الطلاق و لا يلزمه الظهار في قول ابي حنيفة
رحمه الله تعالى - و قال صاحباه رح لزماه جميعا - و هذا بناء على ان
الترتيب في التعليق يوجب الترتيب في النزول عند ابي حنيفة رح
و قال صاحباه رح لا يوجب - فاذا وقع الطلاق اولا عند ابي حنيفة رحمه
الله تعالى والمبانة لا تكون محلا للظهار فلا يلزمه الظهار - اما اذا نزل الظهار
اولا و سبق الظهار لا يخرجها من ان تكون محلا للطلاق فيقع الطلاق ايضا *

١٨٥٤ اذا ظاهر من امرأته ثم طلقها ثلثا ثم تزوجها بعد زوج آخر كان مظاهر 1854
لا يحل له وطئها قبل التكفير - لان وقوع الفرقة لا يبطل الظهار *

١٨٥٥ و كذا لو ارتدت و العياذ بالله ثم اسلمت فتزوجها - و ان ارتدا معا 1855
و العياذ بالله ثم اسلما فهما على الظهار في قول ابي حنيفة رحمه الله تعالى *

١٨٥٦ و كذا لو ظاهر من امرأته و هي امة ثم اشتراها لا يحل له وطئها قبل 1856
التكفير - و كذا لو اعتقها ثم تزوجها *

١٨٥٧ و لو قال لامرأته ان دخلت الدار فانت علي كظهر امي ثم طلقها 1857

١٨٣٦ و لو قالت انت علي كركبة امي في القياس يكون مظاهرا - و لو 1836
قال لها فخذك علي كفخذ امي او راسك علي كراس امي لا يكون ظهارا *

١٨٣٧ و لو قال لها انت علي كظهر امك يكون ظهارا * 1837

١٨٣٨ و لو قال كظهر ابنتك ان كان دخل بها يكون ظهارا و الا فلا * 1838

١٨٣٩ و ان شبهها بامرأة الاب او الابن يكون ظهارا كما لو شبهها بالام * 1839

١٨٤٠ و لو شبهها بمزنية الاب او الابن قال محمد رح لا يكون ظهارا - و قال 1840
ابو يوسف رح يكون ظهارا و هو الصحيح - و لو شبهها بام امرأة او ابنة
امرأة قد زنى بها يكون ظهارا *

١٨٤١ و لو قبل اجنبية بشهوة او نظر الى فرجها بشهوة ثم شبه امرأته بام 1841
تلك المرأة او ابنتها لا يكون ظهارا في قول ابي حنيفة رحمه الله تعالى
قال و لا يشبه هذا الوطي *

١٨٤٢ و لو شبهها بظهر امرأة لا تحل له في الجماة كالمجوسية و المرتدة 1842
و منكوحة الغير لا يكون ظهارا *

١٨٤٣ و كذا التشبيه بالرجل اي رجل كان * 1843

١٨٤٤ و لو قال انت علي كظهر امي ان شاء الله لا يكون ظهارا كما لا يكون طلاقا * 1844

١٨٤٥ و لو قال انت علي كظهر امي ان شاء فلان - او قال انت علي كظهر 1845
امي ان شئت فهو على المشيئة في المجلس *

١٨٤٦ و لو ظاهر من امته او ام ولده يكون باطلا لا يحرم عليه وطئها * 1846

١٨٤٧ و المرأة اذا ظاهرت من زوجها كان باطلا لا يلزمها الكفارة كما لو اضافت 1847
الطلاق الى زوجها - و قال ابويوسف رح يلزمها الكفارة *

١٨٤٨ اذا كرر الظهار على امرأة يلزمه بكل ظهارة كفارة * 1848

١٨٤٩ و كذا لو ظاهر من اربع نسوة يلزمه بكل امرأة كفارة * 1849

بتطليقة - و ان نوى الطلاق او الظهار فهو على ما نوى - و ان لم ينو شيئا لا يلزمه شيء في قول ابي حنيفة رحمه الله تعالى - و قال محمد رح و هو رواية عن ابي يوسف رح انه يكون ظهارا - و في رواية اخرى عن ابي يوسف رح انه يكون ايلاء - و ان نوى به التحريم اختلفت الروايات فيه - والصحيح انه يكون ظهارا عند الكل *

1831 ١٨٣١ و المسئلة الثالثة اذا قال انت حرام كامي و نوى به الطلاق او الظهار او الايلاء فهو على ما نوى - و ان لم ينو شيئا يكون ظهارا في قول محمد رح و هو رواية عن ابي حنيفة رحمه الله تعالى - و في قول ابي يوسف عن ابي حنيفة رحمهما الله تعالى يكون ايلاء - و ذكر الحصاف رح الصحيح من مذهب ابي حنيفة رحمه الله تعالى ما قال محمد رح *

1832 ١٨٣٢ و الرابعة اذا قال لها انت علي حرام كظهر امي فانه يكون ظهارا - و قال ابو يوسف و محمد رح ان نوى الطلاق او الايلاء فهو على ما نوى الا ان عند محمد رح اذا نوى الطلاق يكون طلاقا لا غير - و عند ابي يوسف رح يكون طلاقا و ظهارا و هو كما لو طلق ثم ظاهر او ظاهر ثم طلق فانه يكون طلاقا و ظهارا *

1833 ١٨٣٣ و لو قال لامرأته انت علي كالميتة و الدم و لحم الخنزير اختلفت الروايات فيه - و الصحيح انه اذا لم ينو شيئا يكون ايلاء - و ان نوى الطلاق يكون طلاقا - و ان نو الظهار لا يكون ظهارا *

1834 ١٨٣٤ و لو قال لها انت علي كفخذ امي او بطنها او فرجها يكون ظهارا *

1835 ١٨٣٥ و الاصل فيه انه اذا اشبهها بما لا يحل النظر فيه من اعضاء الام يكون ظهارا - و ان شبهها بما يحل النظر اليه كالشعر و الوجه و الراس و اليد و الرجل لا يكون ظهارا *

الجعل فالبراءة جائزة و الشرط باطل - و الهبة و الصدقة مثل البراءة *

١٨٢٥ رجل قال لامرأته طلاق ترا دادم خريدي خويشتن را فقالت خريدم 1825
خويشتن را بسه بار از زني هشتم فقال الزوج رستي ان اراد الزوج بقوله
رستي اجازة لما قالت المرأة يقع الثلث - و ان لم يرد به الاجازة لا يقع الا
واحدة رجعية * و الله اعلم بالصواب *

باب الظهار

١٨٢٦ الظهار تشبيه المنكوحة بالمحرمة على سبيل التابيد بنسب او رضاع 1826
او صهرية *

١٨٢٧ و حكمة حرمة الوطي و الدواعي الى غاية الكفارة * 1827

١٨٢٨ رجل قال لامرأته انت علي كظهر امي و لم ينو شيئا او نوى به 1828
الطلاق او التحريم او الظهار يكون ظهارا - و قال ابو يوسف و محمد رح
ان نوى به التحريم بالطلاق يكون طلاقا - و ان قال عنيت به الكذب لايسع
لها في القضاء ان تصدقه و تمكنه - و يسعها فيما بينها و بين الله تعالى
و هذه جملة مسائل احدها هذه *

١٨٢٩ و الثانية ان يقول لها انت مثل امي و لم يقل علي و لم ينو شيئا 1829
لا يلزمه شيئ في قولهم *

١٨٣٠ و لو قال انت علي كامي او مثل امي و نوى به البر و الكرامة 1330
لا يلزمه شيئ - و ان نوى الظهار كان ظهارا - و ان لم ينو شيئا لا يلزمه
شيئ في قول ابي حنيفة رحمه الله تعالى - و قال محمد رح هو الظهار
و عن ابي يوسف رح في رواية لا يلزمه شيئ كما قال ابو حنيفة رحمه
الله تعالى - و في رواية يكون يمينا ان تركها اربعة اشهر و لم يقربها بانت

خويشتن از تو بهمه حقها خريدم فقال الزوج دست باز داشتم حكي عن الشيخ الامام ابي بكر محمد بن الفضل رح انه قال يتم الخلع - لان الناس يريدون بهذا و بمثله الجواب *

١٨١٩ امرأة قالت لزوجها وهبت منك حقي چنك از من باز دار فقال 1819 چنك از تو باز داشتم قال ذلك ثلث مرات قال بعضهم يخاف انها تطلق ثلثا - و قال الفقيه ابو الليث رح يقع[٢] واحدة - لان هذا اللفظ تفسير قوله خليت سبيلك و الواقع به بائن و البائن لا يلحقه البائن *

١٨٢٠ امرأة قالت لزوجها بعت طلاقي او وهبت او قالت ملكتك فقال 1820 الزوج قبلت و نوى به الطلاق لا يقع شيئ - لانها لا تملك الطلاق فلا تملك بيع الطلاق و هبته *

١٨٢١ رجل قال لختنه يک طلاق دختر من بمن فروختي بدان كابين كه 1821 او را بر تو است فقال الزوج فروختم و لم يقل الاب قبلت لايقع شيئ *

١٨٢٢ امرأة قالت لزوجها كابين ترا بخشيدم مرا چنك باز دار قالوا ان 1822 طلقها سقط المهر و ان لم يطلق لا يسقط *

١٨٢٣ رجل قال لامرأته بعت منك تطليقة بمهرك و نفقة عدتك بمثل 1823 ماجاء جبرئيل عليه السلام الى النبي صلى الله عليه و سلم فقالت قبلت قالوا ان كانت طاهرة و لم يجامعها في ذلك الطهر طلقت *

١٨٢٤ امرأة ابرأت زوجها عما لها عليه على ان يطلقها فطلقها جازت البراءة 1824 و الافلا - و لو ابرأته عمالها عليه على ان لا يتزوج عليها امرأة فالبراءة جائزة و الشرط باطل - قال الحاكم ابو الفضل رح كل شيئ يجوز فيه الجعل فالبراءة فيه جائزة على الوفاء بذلك الشرط - و كل شيئ لا يجوز فيه

(٢ ن) لا يقع الا واحدة *

اشكري نفسي يحتمل الايجاب و العدة و تنوى في ذلك *

١٨١٢ و لو قالت لزوجها خويشتن از تو خرمي بمهري و نفقة عدتي دادي 1812
فقال الزوج آري يقع الفرقة بينهما - لان قولها خويشتن خرمي ايجاب
بمنزلة قولها خريدم و قول الزوج آري جواب كانه قال دادم - و لو قال
الزوج آري ببينم لايقع الطلاق لان هذا ليس بقبول *

١٨١٣ رجل خلع امرأته ثم قالت بالفارسية ديگر بده فقال الزوج دادم يقع 1813
تطليقة اخرى - لان قولها ديگر بده طلب للطلاق و قول الزوج دادم يصلح
جوابا - و قال بعضهم يقع الثلث كانها قالت لوقع الباقي
و الصحيح هو الاول *

١٨١٤ رجل باع من امرأته تطليقة بمهرها ونفقة عدتها فاشترت ثم قال الزوج 1814
من ساعته هرسه هرسه قالوا يخاف ان يقع الثلث - لان قوله هرسه ينصرف
الى الطلاق كانه قال او قعت الثلث *

١٨١٥ رجل خالع امرأته بتطليقة فقال له رفقاءه لم فعلت هذا فقال بالفارسية 1815
رو بسه باد لايقع بهذا الكلام شيئ آخر - و قد مر هذا في قوله طلاق داده باد *

١٨١٦ رجل خالع امرأته فقيل له كم نويت فقال ما تشاء ان لم ينو الزوج 1816
شيئا طلقت واحدة - لان الزوج لم يوقع الطلاق و انما فوض اليها المشيئة
فلا يقع به طلاق آخر *

١٨١٧ امرأة قالت لزوجها اخلعني و قالت بالفارسية سه خواهم فقال 1817
الزوج سه باد ثم خلعها بتطليقة يقع واحدة - لان قول الزوج اولا سه
باد ليس بايقاع *

١٨١٨ امرأة قالت لزوجها خويشتن از تو بكابين و هزينهٔ عدت خريدم 1818
فقال الزوج دست كوتاه كردم قال بعضهم لا يقع شيئ - و لو قالت

ان كان عليه مهر يبرأ - و ان لم يكن عليه شيئ لاشيئ عليها - و قال بعضهم لايبرأ الزوج عما عليه - و قد ذكرنا هذا فيما اذا اختلعا بلفظة البيع و الشراء بالعربية فكذا اذا كان الخلع بلفظة البيع و الشراء بالفارسية •

1809 ١٨٠٩ رجل قال لامرأته خالعتك و نوى به الطلاق يقع به الطلاق ولا يبرأ عن المهر - لان قوله خالعتك من الكنايات و في غيرهامن الكنايات يقع واحدة بائنة ولا يبرأ عن المهر فكذلك ههنا •

1810 ١٨١٠ و لو قال لها خويشتن ازمن بخر فقالت خريدم و لم يقل الزوج فروختم لايقع الطلاق و كذا لو قال بالعربية اشتري نفسك مني - و لو قال لها اختلعي فقالت اختلعت يقع الطلاق عليها عند اكثر المشائخ رح و الفرق ان قوله اختلعي امر بايقاع الطلاق بلفظ الخلع فاذا لم يذكر البدل صار كانه قال لها ابيني نفسك و لو قال لها ابيني نفسك فقالت ابنت يقع الطلاق و اما قوله اشتري نفسك مني و قوله بالفارسية خويشتن بخر ازمن امر بالمعاوضة فاذا لم يذكر البدل لم يصح الامر بالمعاوضة - بقي كلام المرأة فلا يقع الطلاق - و لو قدر البدل فقال خويشتن بخر بكابين و نفقة عدت او قال لها بالعربية اشتري نفسك مني بمهرك و نفقة عدتك فقالت بالعربية اشتريت او قالت بالفارسية خريدم يتم الخلع •

1811 ١٨١١ امرأة قالت لزوجها بالفارسية خويشتن خرمي بما اعطيت فقال الزوج اعطيت يقع الطلاق ولا تنوى المرأة - و لو قالت خويشتن خرم بما اعطيت فقال الزوج اعطيت لا يصح الخلع ولا تنوي المرأة - لان قولها بالفارسية خويشتن خرمي ايجاب لايحتمل العدة و قولها خويشتن خرم عدة لايحتمل الايجاب انما يذكر في الايجاب خويشتن مي خرم كما يذكر في الشهادة گواهي ميدهم ولا يقال گواهي دهم - اما قولها بالعربية

الطلاق كما لو قال لها خويشتن خريدي بمالک عندي من الوديعة يدخل فيه كل وديعة كانت لها عنده *

1804 ١٨٠٤ رجل قال لامرأته خويشتن را ازين شوي بهر كابين كه تراست بروي و بهر هزينهٔ عدت كه واجب شود ترا بروي بسبب طلاق آختي فقالت آختم ثم قيل للزوج آهنجيدي فقال آهنجيدم يتم الخلع بينهما - لانهما صرحا بما هو فارسية الخلع *

1805 ١٨٠٥ رجل طلق امرأته رجعيا ثم اراد الخلع فقالوا للمرأة خويشتن را ازين مرد بكابين و هزينهٔ عدت بيک طلاق آهنجيدي فقالت آهنجيدم فقيل للزوج تو يک طلاق دادي فقال دادم قال بعضهم يقع تطليقة رجعية و قال بعضهم يقع واحدة بائنة وهو الصحيح - لان قول الزوج خرج جوابا لكلام المرأة *

1806 ١٨٠٦ قوم قالوا لامرأة دخل بها زوجها بهر حقي كه زنان را بر مردان بود بيک طلاق خويشتن خريدي فقالت خريدم فقال الزوج يک طلاق سنت دادم يقع واحدة رجعية - لان البائن لايكون سنيا فيكون مبتديا و هذا الجواب على رواية الاصل - اما رواية الزيادات البائن سني فينبغي ان[٢] لايكون مبتديا *

1807 ١٨٠٧ رجل قال لامرأته بهر حقي كه زنان را بر گردن مردان بود تو خويشتن را از من خريدي فقالت خريدم فقال الزوج رو اكنون لايقع الطلاق لان هذا الكلام قد يذكر للرد فلا يجعل ايقاعا بالشک *

1808 ١٨٠٨ رجل قال لامرأته خويشتن از من خريدي فقالت خريدم فقال الزوج فروختم يقع واحدة بائنة - وهل يبرأ الزوج عن المهر - قال بعضهم

(٢ ن) ان لايصير مبتديا *

١٧٩٩ امرأة قالت لزوجها اشتريت نفسي منك بما اعطيت او قالت اشتري 1799
نفسي منك بما اعطيت و ارادت الايجاب لا العدة فقال الزوج اعطيت
يقع الطلاق - لان مطلوب المرأة من الزوج الطلاق فكان تقدير كلامها
كانها قالت اشتريت نفسي فاعطني الطلاق فاذا قال اعطيت كان
ذلك جوابا لكلام المرأة *

١٨٠٠ قوم قالوا لامرأة اشتريت نفسك بتطليقة بكل حق يكون للنساء 1800
على الرجال من المهر و نفقة العدة فقالت نعم اشتريت فقالوا للزوج
بعت انت فقال نعم قالوا يتم الخلع و يبرأ الزوج عن المهر - و ان لم يقولوا
لها اشتريت نفسك منه - لانها لا تشتري نفسها الا من زوجها *

١٨٠١ امرأة ارادت الخلع فاجتمع قوم و قالوا للمرأة اشتريت نفسك 1801
بجميع الحقوق التي عليه فقالت اشتريت و قالوا للزوج بعت فقال
بعت و في ضميره بيع متاع البيت فانها تطلق قضاء - لانه قال
بعت جوابا لكلامهم و الجواب يتضمن اعادة ما في السوال - والله اعلم *

فصل في الخلع بالفارسية

١٨٠٢ رجل قال لامرأته كل شيء سألني الله تعالى من اجلك بسبب 1802
المهر و غيره ترا فروختم بآن طلاقي كه آن تو است فقالت المرأة اشتريت
قالوا لا يقع الطلاق - لانه باع منها ما هو حقها فلا يصح - كما لو قال لغيره
بعت منك خادمك هذا بعبدي هذا *

١٨٠٣ امرأة سألت الطلاق فقال الزوج مرا فروختي اين زر و سراى بدان 1803
طلاق كه ترا سوى منست فقالت فروختم فقال الزوج خريدم طلقت
ثلثا - لان الطلاق الذي لها عند الزوج ثلث فيقع جميع ما عنده من

و لو قال بعت نفسک منک فقالت اشتريت يقع طلاق بائن - لان بيع الطلاق تمليک الطلاق فاذا لم يذكر البدل يصير كانه قال ملكتک الطلاق فيكون رجعيا - اما بيع نفسها تمليک النفس من المرأة و تمليک النفس لا يحصل الا بالبائن فيكـــون بائنا *

1795 ١٧٩٥ رجل قال لامرأته بعت منك تطليقة بثلثة آلاف درهم قال ذلک ثلث مرات و قالت المرأة بعد كل كلام اشتريت ثم قال الزوج اردت التكرار و الاخبار عن الاول بالثانية و الثالثة لا يصدق قضاء - و يقع ثلث تطليقات - و يلزمها ثلثه آلاف درهم - لانه لما قال اولا بعت منک تطليقة بثلثة آلاف درهم و قبلت وقعت تطليقة بثلثة آلاف درهم فلا يجب المال بالثانية و الثالثة - بقي الثاني و الثالث صريحا و صريح الطلاق يلحق بالبائن *

1796 ١٧٩٦ رجل قال لامرأته بعت منک امرک بالف درهم فقالت في المجلس اخترت نفسي يقع الطلاق بالف درهم - و لو قال لها بعت منک هذا الثوب بمهرك و نفقة عدتک فقالت اشتريت ثم طلقها يقع تطليقة رجعية - و بيع الثوب بالنفقة باطل لجهالة النفقة *

1797 ١٧٩٧ رجل باع من امرأته تطليقة بجميع مهرها و بجميع مالها في البيت غير ما عليها من القميص فقالت اشتريت و عليها حلي و ثياب كثيرة يقع طلاق بائن بما يكون في البيت - و جميع ما يكون عليها من الثياب و الحلي يكون للمرأة - لان لفظة ما في البيت لا يتناول ما عليها من الثياب و الحلـي فلا يستحقها الزوج *

1798 ١٧٩٨ رجل باع من امرأته تطليقة بمالها عليه من المهـــر و الزوج يعلم انه لا مهر لها عليه يقع واحدة رجعية بغير بدل *

بدرهم ثم تزوج امرأة كان لامرأته القبول بعد التزوج في مجلس علمها فان قالت بعد التزوج قبلت او قالت اشتريت او قالت طلقتها يقع الطلاق بما سمى من البدل - و ان قبلت قبل التزوج لا يقع شيء - لان كلام الزوج مضاف الى ما بعد التزوج فيعتبر القبول بعد التزوج *

1791 ١٧٩١ رجل قال لامرأته بعت منك ثلث تطليقات بمهرك او نفقة عدتك فقالت المرأة بعت ولم تقل اشتريت قال ابوبكر السكاف رح يقع تطليقة بائنة كانها قالت بعت مهري و نفقة عدتي بتطليقة - و قال الفقيه ابو الليث رح لا يقع شيء و هو المختـــار - لان كلام المرأة ابتـــداء و ليس بجواب *

1792 ١٧٩٢ امرأة قالت لزوجها بعت منك مهري و نفقة عدتي اشتريتَ فقال الزوج اشتريت خيز رو فقامت و ذهبت قالوا لا تطلق ظاهرا - لان الزوج لم يبع منها نفسها و لا طلاقها و انما اشترى مهرها و شراء المهر لا يكون طلاقا - قالوا و الاحوط تجديد النكاح ان لم يكن طلقها ثنتين قبل ذلك *

1793 ١٧٩٣ رجل قال لامرأته بعت منك تطليقة بمهرك و نفقة عدتك فقالت بجان خريدم يقع الطلاق - لان هذا الكلام يذكر على وجه المبالغة و هو كما قالت بآرزو خريدم *

1794 ١٧٩٤ و لو قال لها بعت منك طلاقك بمهرك الذي لك عليّ فقالت طلقت نفسي فانها تبين بواحدة بمهرها - لان هذا يصلح قبولا لكلام الزوج فيجعل قبولا - و قيل يقع واحدة رجعية و هو نظير ما لو قالت المرأة اخلعني على الف درهم فقال الزوج انت طالق اختلفوا فيه - و الصحيح انه يجعل جوابا لكلام المرأة فكذلك ههنا - و لو قال لامرأته بعت منك تطليقة و لم يذكر البدل فقالت اشتريت يقع واحدة رجعية

١٧٨٦ رجل قال لرجلين اخلعا امرأتي على غير جعل فخلعها احدهما 1786
لم يقع الطلاق *

١٧٨٧ و لو امر رجلين ان يخلعا امرأته بالف فقال احدهما خلعتها بالف 1787
و قال الآخر قد اجزت ذلك قال ابو يوسف رح لا يجوز - و لو قال
احدهما خلعتها بالف و قال الآخر خلعتها بالف فهو جائز *

١٧٨٨ امرأة وكلت رجلا بان يخلعها من زوجها بالف درهم و وكله الزوج ايضا 1788
بان يخلعها منه بالف فخلع الوكيل بالف ذكر في موضع انه لا يتم
الخلع ما لم تقبل المرأة بعد خلع الوكيل او يقبل الزوج او يجيز - قال
و لا يكون وكيلا لهما جميعا - قال الحاكم الشهيد رح و هذا يوافق
رواية الاصل *

فصل في الخلع بلفظ البيع و الشراء

١٧٨٩ اذا قال الرجل لامرأته ابتعت مني او اشتريت مني ثلث تطليقات 1789
بمهرك و نفقة عدتك فقالت اشتريت الصحيح انه لا يقع الطلاق مالم
يقل الزوج بعد كلامها بعت - لان هذا الكلام يحتمل السوم و يحتمل
التحقيق فلا يتم الخلع بقولها اشتريت - و قد مر مثل هذا في قوله لها
اختلعت - و لو قال لها اشتري ثلث تطليقات بمهرك و نفقة عدتك
فقالت اشتريت يتم الخلع بينهما - لان لفظة الامر تفويض اليها و الواحد
يصلح عاقدا من الطرفين في الخلع اذا كان البدل معلوما في الصحيح
من الرواية و البدل ههنا معلوم - اما اللفظ الاول ليس بتفويض فلا
يصير الواحد عاقدا من الطرفين فيحتاج الى قول الزوج بعد ذلك بعت *

١٧٩٠ رجل قال لامرأته كل امرأة اتزوجها فقد بعت طلاقها منك 1790

١٧٧٨ و ان اختلعت على ان مؤنة السكنى عليهـــا كان عليها ان تكتري 1778
بيتا من زوجها او من غيره و تعتد فيه *

١٧٧٩ امرأة اختلعت من زوجها على نفقة ولد له منها ما عاش قال 1779
ابو حنيفة رحمه الله تعالى عليها ان ترد المهر الذي قبضت *

١٧٨٠ امرأة اختلعت من زوجها على ان ترضع ما في بطنها سنتين حتى 1780
يفطم و نفقة الولد بعد الرضاع عشر سنين على انها ان ولدته ميتا فلا
شيء للزوج عليها - و ان ولدت حيا فارضعته سنة ثم مات فلا شيء عليها
قال ابو يوسف رح الشروط كلها جائزة و هي بريئة عما بقي من الرضاع
و النفقة ان مات الصبي او ولد ميتا - و قال زفر رح الشروط كلها فاسدة
و عليها ان ترد المهر على زوجها *

١٧٨١ امرأة اختلعت من زوجها على ان جعلت صداقها اولدها و على ان 1781
تجعل صداقها لفلان اجنبي قال محمد رح الخلع جائز و المهر للزوج
و لا شيء للولد ولا للاجنبي *

١٧٨٢ امرأة اختلعت من زوجها على ارضاع ولدها و لم يسم وقتا قال 1782
محمد رح يجوز ذلك على سنتين *

١٧٨٣ و ان خلعها على ارضاع الولد سنتين و على نفقـــة هذا الولد 1783
عشـــر سنين قال محمـــد رح يجوز - و يتحمـــل مثل هذه الجهالة
في الطلاق *

١٧٨٤ امرأة وكلت رجلا بالخلع ثم رجعت لا يعمـــل رجوعها اذا لم يعلم 1784
الوكيل بذلك *

١٧٨٥ و ان ارسلت بالخلع رسولا الى زوجها ثم رجعت قبل تبليغ الرسالة 1785
صح رجوعها و ان لم يعلم الرسول برجوعها *

١٧٧٣ وخلع السكران جائز - وكذلك سائر تصرفاته الا الردة والاقرار بالحدود و الشهاد على شهادة نفسه - وقال داؤد الاصفهاني رح لاينفذ منه تصرف وبه قال الحسن بن زياد وابو الحسن الكرخي و ابو القاسم الصفار وهو احد قولي الشافعي رح - و قال ابو نصر بن محمد بن سلام رح ان كان معذورا في الشرب بان كان مضطرا او مكرها لا يقع الطلاق ولا ينفذ تصرفاته - و ان لم يكن معذورا يقع طلاقه و ينفذ تصرفاته - و في رواية قياس و استحسان في الاستحسان لا يصح - و في القياس يصح - و عن ابي يوسف رحمه الله انه كان يأخذ بالقياس - فان قضي القاضي بقول واحد منهم نفذ قضاؤه ٭ 1773

١٧٧٤ رجل خلع امرأته و بينهما ولد صغير على ان يكون الولد عند الاب سنين معلومة صح الخلع و يبطل الشرط - لان كون الولد الصغير عند الام حق الولد فلا يبطل بابطالها ٭ 1774

١٧٧٥ امرأة اختلعت من زوجها على مهرها و نفقة عدتها و على ان تمسك الولد بنفقتها سنين معلومة فامسكت الولد سنة او سنتين ثم ردت الولد على الزوج فانها تجبر على ان تمسك الولد بنفقتها - ما بقيت المدة - و لو انها هربت و وارت نفسها حتى تمت المدة ثم ظهرت رجع الزوج عليها بقيمة نفقة الولد في المدة التي لم تمسك الولد ٭ 1775

١٧٧٦ و كذا لو طلق الرجل امرأته على ان تمسك المرأة الولد بنفقتها الى بلوغ الولد و على ان تترك المرأة مهرها عليه فقبلت ثم انها ابت ان تمسك الولد فانها تجبر على ذلك - فان لم تفعل كان عليه اجر امساك الولد الى بلوغه ٭ 1776

١٧٧٧ امرأة اختلعت على انها بريئة من النفقة و السكنى ثم الخلع و تبرأ عن النفقة ولا تبطل السكنى ٭ 1777

١٧٦٦ و ان كان الخلع بين الزوج و ام الصغيرة ان اضافت الام البدل الى مال 1766
نفسها لو ضمنت يتم الخلع كما لو كان الخلع مع الاجنبي و ان لم تضف
ولم تضمن هل يقع الطلاق كما يقع في خلع الاب لا رواية فيه - والصحيح انه
لايقع - و ان كان العاقد اجنبيا و لم يضمن البدل هل يتوقف الخلع - قال
بعضهم ان كانت الصغيرة تعقل العقد و تعبر يتوقف الخلع على قبولها
و قال بعضهم لا يتوقف *

١٧٦٧ و لو اختلعت الصغيرة التي تعقل و تعبر من زوجها على صداقها يقع 1767
طلاق بائن و لا يسقط الصداق *

١٧٦٨ و لو وكلت الصغير وكيلا بالخلع ففعل الوكيل فيه روايتان - في رواية 1768
يصح التوكيل و يتم الخلع بقبول الوكيل كما يتم بقبول الصغيرة - و في
رواية اذا لم يضمن الوكيل البدل لايقع الطلاق كما لو كان الخلع

١٧٦٩ من الاجنبي - و ذكر الخصاف رح في الحيل ان الاب اذا خلع ابنته 1769
الصغيرة على صداقها ان علم الاب ان الخلع خير لها بان كانت لاتحسن
العشرة مع الزوج فخلعها على صداقها على قول مالك رح يسقط الصداق
عن الزوج - فان قضى القاضي بذلك نفذ قضاؤه - لانه قضى في
موضع الاجتهاد *

١٧٧٠ و يجوز الرهن و الكفالة ببدل الخلع * 1770

١٧٧١ وكذا التاجيل - فان اجل الى موت فلان او الى قدوم فلان يجب 1771
البدل للحال و يبطل الاجل - فان اجل الى وقت الحصاد والدياس
صح التاجيل *

١٧٧٢ اذا خالع الاب على ابنه الصغير لا يصح - لانه تعليق الطلاق بالقبول فلا يصح 1772
كما لا يصح من الصغير - ولا يتوقف خلع الصغير على اجازة الاب *

١٧٦٢ اذا طلق الرجل امرأته على جعل في العدة بعد الخلع يقع الطلاق 1762
ولا يجب المال *

١٧٦٣ وكذا لو جعل الزوج مهرها اثلاثا فطلقها تطليقة بثلث مهرها و ثانيا 1763
و ثالثا كذلك يقع ثلث و سقط ثلث المهر و ترجع المرأة على
زوجها بثلثي مهرها *

١٧٦٤ رجل قال لامرأته خالعتك فقبلت يقع الطلاق و يبرأ الزوج عن المهر 1764
الذي لها عليه - و ان لم يكن لها عليه مهر كان عليها رد ما ساق اليها
من الصداق - كذا ذكر الحاكم الشهيد رح في الاقرار من المختصر
و الشيخ الامام المعروف بخواهر زاده رح و به اخذ الشيخ الامام ابو بكر
محمد بن الفضل رح و هو يؤيد ما ذكرنا عن ابي يوسف رح ان
الخلع لا يكون الا بعوض *

١٧٦٥ رجل خلع ابنته من زوجها ان كانت البنت كبيرة و ضمن الاب بدل 1765
الخلع تم الخلع - لان الاجنبي لو فعل ذلك يتم الخلع فالاب اولى - فان
خالع الاب على صداقها وضمن تم الخلع ايضا - ثم ينظر ان اجازت المرأة تصح
اجازتها و يسقط المهر - و ان لم تجز كان صداقها على الزوج - و يرجع الزوج
على الاب بذلك بحكم الضمان ان كان الاب قال له خالع على صداقها
ان اجازت و ان لم تخبر فعلي مقدار ذلك - و ان كانت البنت صغيرة
فان ضمن الاب تم الخلع بقبوله و يكون صداقها على الزوج ثم يرجع الزوج
على الاب - فان لم يضمن الاب لا يجب المال على الاب ولا على الصغيرة كما
لو كانت كبيرة - و هل يقع الطلاق - ان قبلت الصغيرة يقع كما لو كان الخلع
مع الصغيرة فان قبل الاب عقد الخلع اختلف المشائخ رح في وقوع
الطلاق لاختلاف الرواية - و الصحيح انه يقع لان لسان الاب كلسانها *

١٧٥٩ الوكيل بالخلع لا يخاطب بالبدل و يكون البدل على المرأة * 1759

١٧٦٠ رسول المرأة اذا قال للزوج طلقها او امسكها فقال الزوج لا امسكها[٢] و 1760
اطلقها فقال الرسول ابرأنك عن جميع مالها عليك فطلقها فطلقها الزوج
ثم قالت المرأة ما كنت وكلته بالابراء و ادعى الزوج انها قد امرأته
بالابراء يقع الطلاق و يكون حق المرأة على زوجها - و ان لم يدع الزوج
توكيل المرأة فهو على وجهين - ان كان الرسول قال للزوج ابرأنك عما لها
عليك على ان تطلقها فطلقها على ذلك لم يكن الطلاق واقعا و يكون
حقها عليه - لان الطلاق بالابراء عن المهر يتوقف على اجازة المرأة فاذا
لم تجز لايقع الطلاق - و ان كان الرسول قال للزوج طلقها و قد ابرأتك عن
مهرها يقع الطلاق و يكون حقها[٣] على الزوج *

١٧٦١ وكيل المرأة بالخلع اذا قبل الخلع يتم الخلع - و هل يطالب الوكيل 1761
ببدل الخلع فالمسئلة على وجهين - ان كان الوكيل ارسل البدل ارسالا بان
قال للزوج اخلع امرأتك بالف درهم او على هذه الالف و اشار الى
الالف للمرأة كان البدل على المرأة ولا يطالب به الوكيل - و ان اضاف
الوكيل البدل الى نفسه اضافة ملك او ضمان بان قال اخلع امرأتك
على الفي هذه او على هذه الالف و اشار الى الف[٤] نفسه او على الفي
او قال على الف على اني ضامن كان البدل على الوكيل لا يطالب
به المرأة - و للوكيل ان يرجع على المرأة قبل الاداء و بعده - و ان
لم تكن المرأة امرته بالضمان - بخلاف الوكيل بالنكاح من قبل الزوج
اذا ضمن المهر للمرأة و لم يكن الضمان بامر الموكل فانه لا يرجع
على الموكل *

(٢ ن) لا امسكها و لا اطلقها * (٣ ن) المهر * (٤ ن) الف لنفسه *

و قالت المرأة لم اخرج ذكر في النوادر و ان القول قول الزوج و لم يقع الطلاق - قالوا هذا الجواب صحيح ان كان الزوج قال للمامور قل لها انت طالق ان لم تخرجي من المنزل شيئا فقال لها المامور ذلك ثم ادعى الزوج انها قد اخرجت من المنزل شيئا فيكون القول قوله لانه ينكر شرط الطلاق - فاما اذا كان الزوج قال للمامور قل لامرأتي انت طالق على ان لا تخرجي من المنزل شيئا فقال لها المامور ذلك فقبلت ثم قال الزوج انها قد اخرجت من المنزل شيئا لايقبل قوله - لان في هذا الوجه الطلاق يتعلق بقبول المرأة فاذا قبلت يقع الطلاق للحال اخرجت من المنزل شيئا او لم تخرج - كما لو قال لامرأته انت طالق على ان تعطيني الف درهم فقالت قبلت تطلق في الحال و ان لم تعط الفا - و كذا لو قال لامرأته انت طالق علي دخولك الدار فقبلت تطلق للحال و ان لم تدخل - لان كلمة على لتعليق الايجاب بالقبول لا للتعليق بوجوب المقبول *

١٧٥٧ رجل قال لامرأته انت طالق بعد غد على الف درهم و غدا على 1757
الف درهم و اليوم على الف درهم فقالت قبلت فانها تطلق للحال واحدة بالف و يقع الثانية و الثالثة في وقتهما بغير جعل *

١٧٥٨ رجل قال لامرأة لايملكها انت طالق على مائة درهم ان تزوجتك يوما 1758
من الدهر فقالت المرأة قبلت لايقع الطلاق في قول ابي حنيفة رحمه الله تعالى و لا يلزمها المال - و قال ابو يوسف رح هي طالق و المال واجب - و لو انها قالت حين تزوجها قبلت الطلاق الذي جعلت الي بالف درهم يقع الطلاق و يلزمها المال في قول ابي حنيفة رحمه الله تعالى *

مادامت في العدة - لان نفقة العدة لم تكن حقا لها عند الخلع *

١٧٥٤ قوم جاؤا الى رجل و زعموا ان امرأته وكلتهم بالاختلاع فخالعها معهم على 1754
الف درهم ثم انها انكرت التوكيل فان كان القوم ضمنوا المال للزوج يقع
الطلاق و يلزمهم البدل - لانها لما انكرت التوكيل بقي هذا خلع الفضولي
و الفضولي اذا خاطب الزوج في الخلع و ضمن البدل يكون اصيلا فيتم
الخلع بقبوله - و ان كان القوم لم يضمنوا بدل الخلع كان الخلع موقوفا على
اجازة المرأة و قبولها ولم يوجد - فان كان الزوج ادعى انها وكلتهم كان الطلاق
واقعا باقراره و لا يجب المال - هذا اذا خالعوا - وان باع الزوج منهم تطليقة
بالفي درهم اختلفوا فيه - قال ابوالقاسم الصفار رح يقع الطلاق و يلزمهم
المال و ان لم يضمنوا - لان لفظة الشراء لفظ ضمان لانه مبادلة - و قال
ابوبكر البلخي رح هذا و الخلع سواء و هو الصحيح *

١٧٥٥ رجل قال لغيره طلق امرأتي فخالعها المامور او طلقها بمهرها و نفقة 1755
عدتها قال الفقيه ابو جعفر رح يجوز كانت المرأة مدخولا بها او
لم تكن - و قال ابوبكر الاسكاف رح لا يجوز ولا يقع الطلاق و لم يفصل بين
المدخولة و بين غير المدخولة - و عنه انه قال ان كانت مدخولا بها
لايجوز - و ان لم تكن مدخولا بها جاز - و هكذا قال ابو القاسم الصفار رح
و هو المختار - لان طلاق غير المدخول بها يكون بائنا فاذا رضي الزوج
بالابانة بغير بدل كان راضيا بها بالبدل بالطريق الاولى - اما في
المدخولة الطلاق بغير عوض لا يكون بائنا ولا قاطعا للنكاح فلا يكون راضيا
بالابانة فلا ينفذ على الآمر *

١٧٥٦ رجل قال لغيره طلق امرأتي على شرط لا تخرج من المنزل شيئا 1756
فطلقها المامور ثم اختلفا فقال الزوج انها قد اخرجت شيئا من المنزل

فعلت اختلفوا فيه - قال بعضهم يصح ذلك - و قال بعضهم لا يصح اذا لم يقبل الزوج - و المختار انه ان نوى الزوج التحقيق لا السوم يصح و الا فلا - لان هذا الكلام يحتمل السوم و يحتمل التحقيق و الظاهر انه سوم فاذا نوى التحقيق يصح و الا فلا - لانه اذا نوى التحقيق يصير كانه قال خلعت نفسك مني بكذا فاني خلعتك فاذا قالت خلعت تم الخلع *

١٧٥٠ امرأة قالت لزوجها اخلعني على الف درهم فقال الزوج انت طالق 1750
اختلفوا فيه - قال بعضهم كلام الزوج يكون جوابا و يتم الخلع - و قال بعضهم يقع الطلاق ولا يكون خلعا - و المختار ان يجعل جوابا - لانه جواب ظاهرا - فان قال الزوج بعد ذلك لم اعن به الجواب كان القول قوله و يقع الطلاق بغير شيء - و كذا لو قالت المرأة لزوجها اختلعت منك فقال لها طلقتك قال بعضهم هو جواب و يتم الخلع بينهما و قال بعضهم يقع واحدة رجعية - و قال بعضهم يسأل الزوج عن النية ان قال نويت به الجواب كان جوابا - و في المسئلة الاولى ينبغي ان يسأل الزوج عن النية ايضا *

١٧٥١ مدخولة سألت طلاقها فقال الزوج ابرأيني عن كل حق لك علي 1751
حتى اطلقك فقالت قد ابرأتك عن كل حق يكون للنساء على الرجال فقال الزوج في فور ذلك طلقتك واحدة قالوا يقع واحدة بائنة - لانه طلقها عوضا عن الابراء ظاهرا *

١٧٥٢ امرأة اختلعت على مال بعد الدخول ثم زادت في البدل بعد 1752
الخلع لا يصح *

١٧٥٣ امرأة اختلعت من زوجها بكل حق لها عليه كانت لها النفقة 1753

١٧٤٦ و لو قالت طلقني واحدة بالف فقال انت طالق ثلثا طلقت ثلثا بغير 1746
شيوع في قول ابي حنيفة رحمه الله تعالى - و قال صاحباه رح يقع
واحدة بالف و ثنتان بغير شيوع *

١٧٤٧ و لو قالت طلقني واحدة بالف و قال لها الزوج انت طالق ثلثا 1747
بالف يتوقف ذلك على قبول المرأة - ان قبلت يقع الثلث بالف
و ان لم تقبل لا يقع شيوع *

١٧٤٨ رجل قال لامرأته اختلعي او اخلعي نفسك مني بالمهر و نفقة العدة 1748
ثم لقنها بالعربية حتى قالت اختلعت منك بالمهر و نفقة العدة
و ابرأتك من المهر و نفقة العدة و هي لا تعلم معنى الكلام اختلفوا
فيه - قال بعضهم ان قال الزوج بعد ما قالت اختلعت بالمهر و نفقة
العدة و ابرأتك من المهر و نفقة العدة اجزت ذلك او قبلت صح الخلع
فان لم يقل الزوج ذلك لا يصح الخلع لكن يبرأ الزوج عن المهر و نفقة
ما مضى - لان قول الزوج للمرأة اختلعي بالمهر و النفقة تفويض او توكيل
فلا يثبت بدون علم المرأة فاذا قالت خلعت نفسي منك بالمهر
والنفقة كان ذلك ابتداء كلام من المرأة و الجهالة لا تمنع ذلك لان الجهالة
لا تمنع صحة الابراء كما لا تمنع وقوع الطلاق و العتاق و التدبير بالعربية
و ان كان لا يعلم معناه فاذا قبل الزوج بعد ذلك صح - و ان لم يقبل
لا يقع شيوع - و قال بعضهم لا يصح الخلع ولا يبرأ الزوج عن المهر و النفقة
و ان قبل الزوج اذا لم تعلم المرأة معنى اللفظ - لان الخلع بمنزلة المعاوضة
في جانب المرأة فلا يصح بدون العلم كالبيع و نحو ذلك و البرأة عن
المهر و النفقة تحتمل الفسخ و تبطل بالرد فلا يكون بمنزلة الطلاق و العتاق *

١٧٤٩ رجل قال لامرأته خلعت نفسك مني بكذا فقالت خلعت او قالت 1749

يقع الخلع عليه - و ان لم يكن يقع بغير شيء - ثم رجع عن هذا و قال عليها رد ما ساق من الصداق و لا سبيل له على الثمر - لان الاشارة لغت لعدم المشار اليه فصار كما لو خالعها على مال فيلزمها رد المهر - و في فصل الولد لغت الاشارة ايضا لعدم الولد - و بقيت تسمية ما في البطن و ما في البطن يتناول المال وغير المال *

1741 ١٧٤١ و لو اختلعت على ما في يدها من الدراهم يجوز - ثم ينظر ان كانت في يدها ثلثة دراهم او اكثر كان له ذلك - و ان لم يكن في يدها دراهم كان عليها ثلثة دراهم كما لو خالعها على الدراهم و ان كان في يدها درهم او درهمان يكمل ثلثة دراهم - و هذا بخلاف ما لو تزوج امرأة على دراهم فانه ثمة يجب لها مهر المثل *

1742 ١٧٤٢ و ان خالعها على عبد او ثوب فان كان معينا جاز - و يكون للزوج ذلك - و ان لم يكن العبد معينا يستحق عبدا وسطا - و في الثوب و الحيوان يقع الطلاق و يلزمها رد المهر *

1743 ١٧٤٣ رجل قال لامرأته انت طالق ثلثا اذا اعطيتني الفا اومتى اعطيتني الفا فقبلت لا يقع الطلاق قبل الاعطاء - وان اعطت في ذلك المجلس او غيره يقع الطلاق - و لو قال انت طالق أن اعطيتني الفا يتعلق الطلاق بالاعطاء في المجلس *

1744 ١٧٤٤ امرأة قالت لزوجها و قد كان طلقها سنتين طلقني ثلثا على ان لك علي الف درهم فطلقها واحدة كان عليها كل الالف *

1745 ١٧٤٥ امرأة قالت لزوجها طلقني واحدة بالف درهم و قال لها الزوج انت طالق واحدة و واحدة و واحدة يقع الثلث - واحدة بالالف و ثنتان بغير شيء عند الكل *

من مهرها يجعل واصلا بجهة الخلع فيرجع عليها بما قبضت - و لا تبرأ المرأة بالخلع عما قبضت في قول ابي حنيفة رحمه الله تعالى - لان بدل الخلع لم يسلم للزوج بحكم الجهالة فكان عليها رد منفعة البضع و قد عجزت عن ذلك بحكم الطلاق فكان عليها رد قيمتها و هو المهر *

1735 ١٧٣٥ رجل خالع امرأته على ان ترد على الزوج جميع ما قبضت منه و كانت المرأة باعت ما قبضت منه او وهبت من انسان و دفعت اليه حتى تعذر عليها رد ذلك على الزوج كان عليها قيمة المقبوض لو كان المقبوض من ذوات القيم - و ان كان من ذوات الامثال كان عليها مثل ذلك *

1736 ١٧٣٦ رجل خلع امرأته على عبدها فاستحق العبد كان عليها قيمة العبد و كذا لو خالع امرأته على عبد الغير و لم يجز صاحب العبد *

1737 ١٧٣٧ و لو خالعها على ما في بيتها من المتاع فان كان لها فيه متاع فللزوج ذلك - و ان لم يكن كان عليها رد ما قبضت من المهر *

1738 ١٧٣٨ و ان خالعها على ما في بيتها من شيء فان لم يكن في البيت شيء كان الخلع واقعا عندنا بغير بدل ذكر الشيء بالالف و اللام او بدونها - و كذا لو خالعها على ما في بيتها و ليس في البيت شيء *

1739 ١٧٣٩ و لو اختلعت على ما في نخيلها من الثمار جاز الخلع - و يكون له ما على النخيل من الثمار قل ذلك او كثر - فان لم يكن على النخيل ثمار كان عليها رد المهر *

1740 ١٧٤٠ و لو خلعها على ما يثمر نخيلها العام جاز الخلع - و كان ابو يوسف رح اولا يقول ان اثمرت فله ذلك - وان لم تثمر جاز الخلع بغير شيء - كما لو خالعها على ما في بطن جاريتها او غنمها و ثمه ان كان في البطن ولد

البيت فانه يقع الخلع بغير شيئ - و كذا لو باع شيئا بدين له عليه و هو يعلم انه لا دين له عليه ذكر الشيخ الامام المعروف بخواهر زاده رح انه لا يصح هذا البيع *

1732 ١٧٣٢ رجل تزوج امرأة على مهر مسمى ثم طلقها بائنة بعد الدخول ثم تزوجها ثانيا بمهر آخر ثم اختلعت منه على مهرها برئ الزوج عن المهر الذي يكون في النكاح الثاني دون الاول - و كذا لو قالت بالفارسية خويشتن خريدم از تو بكابين و بهمه حقها كه مرا بر تو است فان الزوج لا يبرأ عن المهر الاول *

1733 ١٧٣٣ اذا وهب من زوجها نصف الصداق او اقل او اكثر ثم اختلعت منه بمال معلوم قبل الدخول بها كان للزوج بدل الخلع و لا يرجع احدهما على صاحبه بشيئ في قول ابي حنيفة رحمه الله تعالى - و على قول صاحبيه رح الخلع في حكم المهر بمنزلة الطلاق - و لو وهبت نصف الصداق قبل القبض ثم طلقها قبل الدخول بها لا يرجع احدهما على صاحبه بشيئ فكذلك في الخلع - و ان كانت المرأة قبضت مهرها ثم وهبت النصف من الزوج و دفعت اليه ثم طلقها قبل الدخول بها رجع الزوج عليها بنصف المهر فكذلك في الخلع يرجع عليها بنصف المهر *

1734 ١٧٣٤ و لو تزوج امرأة على الف درهم ثم وهبت نصف المهر او اقل او اكثر و قبضت الباقي ثم اختلعت منه بمال مجهول كما لو اختلعت بثوب او حيوان في الذمة جاز الخلع - و يرجع الزوج عليها بما قبضت من بقية مهرها و لا يرجع بما وهبت - لان بدل الخلع اذا كان مجهولا كان الواجب عليها بحكم الخلع رد المهر فما وصل الى الزوج بسبب الهبة

الوجه الاول - و في رواية يتم الخلع بالف درهم و ان لم يقل الزوج اجزت و هو الصحيح - و الوجه الثالث ان يقول لها اخلعي نفسك و لم يزد عليه فقالت اختلعت ذكر في المنتقى عن ابي يوسف رح انه لا يكون خلعا - و كذلك لو قال لغيره اخلع امرأتي ليس له ان يخلعها الا بمال - لان الخلع غالبا يكون بعوض - و روى ابن سماعة عن محمد رح انه اذا قال لها اخلعي نفسك فقالت خلعت يقع طلاق بائن بغير بدل كانه قال لها ابيني نفسك و به اخذ اكثر المشائخ رح - و ان كان الخطاب من قبل المرأة فقالت اخلعني او بارئني فقال الزوج فعلت فهذا و ما لو كان الخطاب من قبل الزوج في الوجوه سواء *

١٧٣٠ رجل خلع امرأته بمالها عليه من المهر ثم ظهر انه لم يكن لها عليه 1730
شيئ كان عليها رد المهر كما لو باع شيئا بدين له عليه ثم تصادقا ان لادين له كان البيع بمثل ذلك الدين في ذمة المشتري - و كما لو قال خلعتك على عبدك الذى في يدي او على متاعك الذى في يدي ثم ظهر انه لم يكن لها في يده شيئ كان الخلع بمهرها - ان كان المهر على الزوج يسقط - و ان كانت قبضت مهرها من الزوج ردت على الزوج ما قبضت *

١٧٣١ و لو خلعها على مهرها او طلقها تطليقة بمهرها الذى عليه 1731
فقبلت و الزوج يعلم انه لا مهر لها عليه يقع تطليقة بائنة بغير شيئ في الخلع - و في الطلاق بمهرها تقع تطليقة رجعية - لان الزوج اذا كان يعلم انه لا مهر لها عليه كان قاصدا ايقاع الطلاق فيقع الطلاق بغير بدل كما لو خالعها على خمر او خنزير او بشيئ لا قيمة له - و كما لو خالع امرأته على مالها في هذا البيت من المتاع و الزوج يعلم انه ليس لها متاع في

تمام المدة فلا رجوع لي عليك - و جنس هذه المسئلة يأتي في فصل على حدة ان شاء الله تعالى *

1725 ١٧٢٥ رجل قال لامرأته ان دخلت الدار فقد خالعتك على الف فدخلت الدار يقع الطلاق بالف يريد به اذا قبلت عقد الدخول - لان الخلع من قبل الزوج يمين فيصح تعليقه بالشرط *

1726 ١٧٢٦ امرأة قالت لزوجها اختلعت منك بكذا و هو ينسج كرباسا فجعل ينسج و هو يخاصمها قائم قال خلعت قالوا ان لم يطل فهو جواب - لان المجلس لا يتبدل بقليل عمل كان فيه - وان اطال ذلك ينقطع المجلس فلا يكون جوابا *

1727 ١٧٢٧ رجل قال لامرأته خلعتك فقالت قبلت يقع طلاق بائن - و كذا اذا لم تقبل المرأة - لان الطلاق يقع بقول الرجل خلعتك - فان قال الزوج بعد ذلك لم انو به الطلاق كان القول قوله اذا لم يكن ذلك في حال مذاكرة الطلاق *

1728 ١٧٢٨ و لو قال خلعتك على كذا و سمى مالا معلوما لا يقع الطلاق ما لم تقبل - كما لو قال لها طلقتك على الف درهم لم يقع الطلاق ما لم تقبل فان قال الزوج بعد قبول المرأة لم انو به الطلاق لا يصدق قضاء - لان ذكر العوض دليل على نية الطلاق ظاهرا *

1729 ١٧٢٩ و لو قال لها اخلعي نفسك لو قال اختلعي فالمسئلة على وجوه ثلثة احدها ان يقول اخلعي نفسك بمال ولم يقدر فقالت خلعت نفسي بالف درهم ففي هذا الوجه لا يقع الطلاق مالم يقل الزوج اجزت - لان جهالة البدل تمنع صحة التوكيل - و الثاني ان يقول لها اخلعي نفسك بالف درهم فقالت خلعت في رواية لا يتم الخلع ما لم يقل الزوج اجزت كما في

1719 و كذا لو تزوج امرأة على الف درهم و لم يدخل بها و لم يقبض المرأة شيئا حتى خالعها على الف درهم قال ابو حنيفة رحمة الله تعالى يلزمها الف و لا شيء لها (٢) - و قال ابو يوسف و محمد رح تعطيه خمسمائة و تصير خمسمائة من البدل قصاصا بخمسمائة من المهر *

1720 و ان كان الخلع بلفظ البيع و الشراء قال ابو يوسف و محمد رح الجواب فيه كالجواب في الخلع - و اختلف المشائخ رح فيه على قول ابي حنيفة رحمه الله تعالى - قال بعضهم الجواب فيه عنده كالجواب في الخلع - و قال بعضهم الخلع بلفظ البيع و الشراء عند ابي حنيفة رحمه الله تعالى لا يوجب البراءة عن المهر الا بذكر المهر كماهو مذهبهما و هو الصحيح *

1721 و فيما اذا كان الخلع بلفظ الخلع هل يقع البراءة عن دين آخر غير المهر - عند ابي حنيفة رحمه الله تعالى لا يقع البراءة في ظاهر الرواية و هو الصحيح *

1722 و لا يقع البراءة عن نفقة العدة في الخلع و المباراة و الطلاق بمال الا بالشرط في قولهم *

1723 و كذا لا يقع البراءة عن نفقة الولد و الرضاع من غير شرط - و ان شرط البراءة عن ذلك فان وقت لذلك وقتا جاز و الا فلا *

1724 و اذا جازت البراءة عند بيان الوقت و الشرط فان مات الولد قبل تمام المدة كان للزوج ان يرجع عليها بحصة الاجر الى تمام المدة - فان ارادت المرأة ان لا يكون عليها حق الرجوع قالوا الحيلة في ذلك ان يقول الزوج خالعتك على اني بريء من نفقة الولد الى سنتين - فان مات الولد قبل

(٢ ن) ولا شيء لها عليه *

صاحبيه رحمهما الله تعالى يسقط عنه مائة درهم و ترجع المرأة عليه بتسعمائة - و ان لم تكن المرأة مدخولة فان كان المهر مقبوضا رجع الزوج عليها بعشر نصف المهر و ذلك خمسون - لان مهرها عند الطلاق قبل الدخول نصف المهر فيرجع عليها بعشر نصف المهر و يسلم لها الباقي - و عند صاحبيه رح يرجع عليها بخمسين لما قلنا - و يرجع ايضا بخمسمائة بسبب الطلاق قبل الدخول - و ان لم يكن المهر مقبوضا برأ الزوج عن جميع مهرها في قول ابي حنيفة رحمه الله تعالى و عند صاحبيه رح سقط عن الزوج خمسمائة بسبب الطلاق قبل الدخول و خمسون بحكم البدل - و ترجع عليه باربعمائة و خمسين *

1717 ١٧١٧ و ان كان الخلع بلفظ المباراة فالجواب عند ابي حنيفة رحمه الله تعالى ما ذكرنا[٢] في الخلع عنده - و عند محمد رح الجواب فيه ايضا ما ذكرنا في الخلع عنده - و عند ابي يوسف رح الجواب في المباراة ما ذكرنا في الخلع عند ابي حنيفة رحمه الله تعالى *

1718 ١٧١٨ فان طلقها بمال او بمهرها عند ابي يوسف و محمد رح الجواب فيه كالجواب في الخلع عندهما - و عن ابي حنيفة رح فيه روايتان - في رواية الجواب فيه ما ذكرنا في الخلع عنده - و في رواية الجواب فيه ما قلنا لابي يوسف و محمد رح و هو الصحيح - حتى لو طلق امرأته قبل الدخول بها على الف درهم و مهرها على الزوج ثلثة آلاف درهم سقط الف و خمسمائة بالطلاق قبل الدخول و بقي الف وخمسمائة - و للزوج عليها بحكم البدل الف درهم فيصير الف قصاصا بالالف و يبقى لها عليه خمسمائة و لا يسقط ذلك *

(٢ ن) ما ذكر في الخلع *

١٧١٤ ثم الخلع قد يكون بلفظ الخلع و قد يكون بلفظ البيع و الشراء و قد يكون 1714
بالفارسية - فان كان الخلع بلفظ الخلع فان خالعها على مال معلوم ولم يذكر
المهر فقبلت المرأة يلزمها البدل - و اما حكم المهر فان كانت المرأة
مدخولة و قد قبضت المهر يلزمها البدل و لا يرجع احدهما على صاحبه
بشيئ في قولهم - و ان لم تكن المرأة مدخولة و قد قبضت مهرها
عند ابي حنيفة رحمه الله تعالى يرجع الزوج عليها بالبدل لا غير
و عند صاحبيه رح يرجع الزوج عليها بالبدل و نصف المهر
و ان لم يكن المهر مقبوضا عند ابي حنيفة رحمه الله تعالى لا ترجع
المرأة عليه بشيئ من المهر - و عند صاحبيه رح ترجع المرأة عليه
بنصف المهر *

١٧١٥ و ان خالعها على مهرها فان كانت المرأة مدخولة و قد قبضت 1715
مهرها رجع الزوج عليها بمهرها - و ان لم يكن المهر مقبوضا سقط عن
الزوج جميع المهر و لا يتبع احدهما صاحبه بشيئ - و ان لم تكن المرأة
مدخولة فان كانت قبضت مهرها و هو الف رجع الزوج عليها
في الاستحسان بالالف - و في القياس يرجع عليها بالف و خمسمائة
الف بحكم البدل و خمسمائة بالطلاق قبل الدخول - و ان لم تكن
قبضت مهرها في القياس يرجع الزوج عليها بخمسمائة - و في
الاستحسان يسقط المهر عن الزوج و لا يرجع عليها بشيئ *

١٧١٦ و ان خالعها على بعض مهرها بان خالعها على عشر مهرها و مهرها 1716
الف ان كانت المرأة مدخولة و المهر مقبوض رجع الزوج عليها بمائة
درهم و يسلم لها الباقي في قولهم - و ان لم يكن المهر مقبوضا سقط
عن الزوج كل المهر في قول ابي حنيفة رحمه الله تعالى - و في قول

ان اعتقهما جميعا - و يسعى كل واحد منهما في نصف قيمته *

1711 ١٧١١ الوكيل بالعتاق اذا اقر انه اعتقه امس و كذبه الموكل لا يقبل قول الوكيل - لانه اقر بالاعتاق بعد خروجه عن الوكالة - و كذا الوكيل بالطلاق *

باب الخلع

1712 ١٧١٢ الخلع و الطلاق بمال بمنزلة اليمين في جانب الزوج - و كذا العتق بمال في جانب المولى - و هو معاوضة في جانب المرأة و العبد فيراعى احكام اليمين في جانب الزوج - حتى لو قال خالعتك على كذا ثم رجع قبل قبول المرأة لا يصح رجوعه - و كذا لو قام الزوج قبل قبول المرأة صح قبولها - و يصح كلامه و ان كانت المرأة غائبة - و اذا بلغها الخبر كان لها خيار القبول في مجلسها - و كذا لو قال الزوج اذا جاء غد فقد خالعتها على الف - او قال اذا قدم فلان فقد خالعتها على الف يصح و يكون القبول الى المرأة بعد مجيء الغد و القدوم في مجلسها و لو شرط الخيار في الخلع لا يصح شرط الخيار من جانب الزوج كما لا يصح في اليمين من كل وجه *

1713 ١٧١٣ و يراعى احكام المعاوضات في جانب المرأة و العبد حتى لو ابتدأت المرأة بالخلع ثم رجعت قبل قبول الزوج صح (٢) رجوعها علم الزوج برجوعها او لم يعلم - و يبطل كلامها بقيام احدهما ايهما قام - و لا يصح كلام المرأة عند غيبة الزوج اذا لم يقبل احد - و كلام المرأة و العبد لا يقبل التعليق و الاضافة - و لو اختلعت و شرطت الخيار لنفسها صح شرطها في قول ابي حنيفة رحمه الله تعالى - و قال صاحباه رح لا يصح *

(٢ ن) يصح رجوعها *

من طلاق الوكيل - لان التوكيل اذا كان قبل طلاق الزوج يكون توكيلا بطلاق يوجب المال فاذا طلقها الموكل بالف بعد التوكيل لا يتصور طلاق يوجب المال فينعزل الوكيل ضرورة - اما اذا وكل رجلا ليطلق المبانة بالف فانما وكله بطلاق يذكر فيه العوض لا بطلاق يوجب العوض - لان الزوج لا يملك ذلك وقت التوكيل فاذا اتى الوكيل بما امر به يقع - كما لو وكل رجلا ببيع عبده فجن الوكيل جنونا يعقل فيه البيع و الشراء ثم باع الوكيل لا ينفذ بيعه - و لو وكل رجلا مجنونا بهذه الصفة ببيع عبده ثم باع الوكيل نفذ بيعه - لانه اذا لم يكن مجنونا وقت التوكيل كان التوكيل ببيع يكون العهدة فيه على الوكيل - و بعد ما جن الوكيل لو نفذ بيعه كانت العهدة فيه على الموكل فلا ينفذ - اما اذا كان الوكيل مجنونا وقت التوكيل فلما وكل ببيع يكون العهدة فيه على الموكل - فاذا اتى بذلك نفذ بيعه على الموكل *

١٧٠٧ رجل وكل غيره بالطلاق او العتاق فوكل الوكيل رجلا آخر فطلق الثاني 1707
و الاول حاضر او غائب لا يجوز *

١٧٠٨ و كذا لو وكل رجلا بالطـــلاق او العتاق فطلقهـــا اجنبي فاجاز الوكيل 1708
ذلك لا يجوز *

١٧٠٩ و في الخلع و النكاح اذا وكل الوكيل غيره ففعل الثاني بحضرة الاول 1709
او فعل اجنبي فاجاز الوكيل جاز *

١٧١٠ و عن محمد رح في رجلين لكل واحد منهما عبد فوكل كل واحد 1710
من المولیین رجلا ليعتق عبده فقال الوكيل اعتقت احدهما ثم مات الوكيل
قبل البيان قال في القياس ان لا يعتق واحد منهما - و لكني (٢) استحسن

(٢ ن) و لكن استحسن *

١٧٠٠ اذا وكل رجلين بالطلاق كان لكل واحد منهما ان يطلق اذا لم يكن 1700
الطـــلاق بمال *

١٧٠١ و لو وكلهما بالطلاق و قال لايطلقها احدكما بدون صاحبه فطلقها احدهما 1701
ثم طلق الآخر او طلق احدهما و اجاز الآخر لايقع شيئ *

١٧٠٢ و لو وكلهما بالطلاق بمال لايتفرد به احدهما - و كذلك في العتق سواء 1702
كانا وكيلين من قبل الزوج او من قبل المرأة *

١٧٠٣ و لو قال لرجلين طلقاها جميعا ثلثا فطلقها احدهما واحدة ثم طلقها 1703
الآخر تطليقتين لايقع شيئ حتى يجتمعا على الثلث *

١٧٠٤ الوكيل بالطلاق اذا لم يكن بمال لاينعزل بطلاق الموكل طلقها الموكل 1704
بائنا او رجعيا و يكون للوكيل ان يطلقها بعد ذلك مادامت في العدة
و اذا انقضت عدتها ينعزل حتى لو تزوجها الموكل بعد انقضاء العدة
ثم طلقها الوكيل لايقع شيئ - و لو تزوجها الموكل قبل انقضاء العدة ثم
طلقها الوكيل يقع *

١٧٠٥ رجل قال لغيره طلق امرأتي تطليقة بالف درهم ثم طلقها الزوج بالف 1705
درهم فقبلت طلقت واحدة بالف درهم و كان ذلك عزلا للوكيل علم
الوكيل بطلاق الموكل او لم يعلم حتى لو تزوجها الموكل بعد طلاقه ثم طلقها
الوكيل تطليقة بالف فقبلت لا يقع شيئ - لانه انعزل بطلاق الموكل *

١٧٠٦ رجل طلق امرأته تطليقة بائنة ثم قال لغيره طلقها بالف فلم يطلقها 1706
الوكيل حتى تزوجها الزوج في العدة ثم طلقها الوكيل بالف فقبلت
طلقت بالف - و ان لم يتزوجها الزوج قبل طلاق الوكيل فطلقها الوكيل
في العدة واحدة بالف فقبلت يقع عليها تطليقة بغير شيئ - بخلاف ما اذا
وكل بطلاقها بالف ثم طلقها الزوج بالف ثم طلقها الوكيل بالف لا يقع شيئ

الوكيل - و لا يقع به الطلاق و لا للحال و لا اذا حاضت و طهرت - لان الوكيل لا يملك الاضافة - فان الرجل اذا قال لغيره طلق امرأتي اذا حاضت و طهرت فقال الوكيل اذا حضت و طهرت فانت طالق كان باطلا و كذا لو قال لغيره طلق امرأتي غدا فقال لها الوكيل انت طالق غدا كان باطلا - و كذا لو قال طلق امرأتي فقال لها الوكيل انت طالق اذا دخلت الدار فدخلت لا يقع شيئ *

١٦٩٨ و لو قال لغيره طلق امرأتي ثلثا للسنة فقال لها الوكيل في طهر 1698 لم يجامعها فيه انت طالق ثلثا للسنة يقع للحال واحدة و يبطل الباقي و قيل على قياس قول ابي حنيفة رحمه الله تعالى ينبغي ان لا يقع شيئ - لانه مامور بايقاع الواحدة في كل طهر و عنده المامور بالواحدة اذا اوقع الثلث لا يقع شيئ - والاصح انه يقع واحدة في كل طهر بلا خلاف لان عند ابي حنيفة رحمه الله تعالى يعتبر الموافقة من حيث اللفظ فان الرجل اذا قال لغيره طلق امرأتي ثلثا فطلقها الفا لا يصح و كذا لو قال لغيره طلق امرأتي نصف تطليقة فطلقها الوكيل تطليقة لا يقع شيئ و ههنا وجدت الموافقة من حيث اللفظ فيقع واحدة *

١٦٩٩ رجل قال لغيره طلق امرأتي ثلثا للسنة بالف فقال لها الوكيل في 1699 وقت السنة انت طالق ثلثا للسنة بالف فقبلت يقع واحدة بثلث الالف - فان طلقها الوكيل في الطهر الثاني تطليقة بثلث الالف فقبلت يقع اخرى بغير شيئ - و كذا لو طلقها الثالثة في الطهر الثالث - و لو طلقها الوكيل اولا تطليقة بثلث الالف ثم تزوجها الزوج ثم طلقها الوكيل تطليقة اخرى بثلث الالف يقع الثانية بثلث الالف - و كذا الثالثة على هذا الوجه *

امرها بيدك وطلقها كان الثاني غير الاول - لان الواو للعطف - فاما حرف الفاء يكون في هذا (٢) الموضع لبيان السبب فلا تملك الا واحدة - و اذا ذكر بحرف الواو فطلقها الوكيل في المجلس تبين بتطليقتين - لان الواقع بحكم الامر يكون بائنا فاذا كان احدهما بائنا كان الآخر بائنا ضرورة انه لا يملك الرجعة - و لو طلقها الوكيل بعد القيام عن المجلس يقع واحدة رجعية - لان التفويض بطل بالقيام عن المجلس و بقي التوكيل بصريح الطلاق - و كذا لو قال امرها بيدك و طلقها *

١٦٩٤ و لو قال طلقها و ابنها او قال ابنها و طلقها في المجلس او في غيره 1694 يقع تطليقتان - لانه وكله بشيئين بالابانة و الطلاق و التوكيل لا يبطل بالقيام عن المجلس فيقع طلاقان *

١٦٩٥ رجل فوض طلاق امرأته الى صبي قال في الاصل ان كان ممن يعبر يجوز * 1695

١٦٩٦ ولو جعل طلاق امرأته بيد رجل فجن المجعول اليه وطلق قال محمد 1696 رح ان كان لا يعقل ما يقول لا يقع طلاقه - ولو جن الموكل بالطلاق ان جن ساعة ثم افاق فالوكيل على وكالته - و لو جن زمانا دائما بطلت وكالته - و ذكر ابن سماعة عن محمد رح انه قدر الدائم اولا بيوم ثم رجع و قال ان جن شهرا يخرج - و لن جن دون ذلك لا يخرج - ثم رجع و قال لا يخرج حتى يجن سنة - و ابو حنيفة رحمه الله تعالى لم يقدر لذلك (٣) وقتا *

١٦٩٧ رجل قال لغيره طلق امرأتي تطليقة للسنة فقال لها الوكيل انت طالق 1697 للسنة ان كانت المرأة في طهر لم يجامعها فيه و لا في حيضها طلقت واحدة - و ان كانت حائضا او كانت في طهر جامعها فيه بطل كلام

(٢ ن) في هذه المواضع * (٣ ن) في ذلك *

في الوكالة صحت الوكالة و بطل الخيـــار *

١٦٨٩ رجل له اربع نسوة فقال لغيره طلق امرأتي فطلق الوكيل احدى نسائه 1689
بغير عينها او قال طلقت امرأتك جاز - و يكون البيان الى الزوج لا الى
الوكيل - و كذا لو طلق الوكيل احدى نسائه بعينها جاز - فان قال الزوج
لم اعن هذا لا يقبل قوله - و هو كما لو قال لغيره بع عبدا من عبيدي
فباع الوكيل عبدا بعينه من عبيده جاز - فان قال الموكل لم اعن هذا
لم يقبل قوله *

١٦٩٠ رجل قال لغيره امر امرأتي بيدك فطلقها فقال لها المامور في المجلس 1690
انت طالق او قال طلقتك تقع تطليقة بائنة الا اذا نوى الزوج ثلثا
فثلث - و كذا لو قال الرجل لغيره طلق امرأتي و امرها بيدك و هذا
و الاول سواء *

١٦٩١ و لو قال لغيره امر امرأتي بيدك في تطليقة او بتطليقة فطلقها فطلقها 1691
المامور في المجلس يقع واحدة رجعية - وكذا لو قال لغيره طلق
امرأتي فقد جعلت ذلك اليك فهو تفويض يقتصر على المجلس - و
اذا طلقها في المجلس يقع واحدة رجعية - و كذا لو قال جعلت اليك
طلاقها فطلقها يقتصر على المجلس و يكون رجعيا *

١٦٩٢ ولو قال لغيره طلق امرأتي فابنها او قال ابنتها فطلقها فهو توكيل لايقتصر 1692
على المجلس - و للزوج ان يرجع عنه - و اذا طلقها الوكيل يقع تطليقة
بائنة - و ليس لهذا الوكيل ان يوقع اكثر من واحدة *

١٦٩٣ و لو قال لغيره طلق امرأتي و قد جعلت امرها بيدك او قال جعلت 1693

(٢ ن) فقال لها المامور في المجلس انت طالق تقع تطليقة بائنة و كذا لو قال قد
طلقتك تقع تطليقة بائنة الا اذا اه * (٣ ن) رجل قال لغيره * (٤ ن) لهذا الرجل *

١٦٨٣ رجل قال لغيره اذا تزوجت فلانة فطلقها و تزوجها[٢] كان للوكيل ان يطلقها 1683
لان تعليق الوكالة بالشرط جائز *

١٦٨٤ و لو وكل غائبا بطلاق امرأته فطلقها الوكيل قبل ان يعلم بالوكالة فطلاقه 1684
باطل - لان الوكالة لا تثبت قبل العلم *

١٦٨٥ رجل وكل رجلا بطلاق امرأته فرد الوكيل ثم طلقها لا يقع طلاقه - و ان 1685
سكت الوكيل ولم يقبل ولم يرد حتى طلق الوكيل يقع طلاقه استحسانا *

١٦٨٦ رجل قال لغيره انت وكيلي في طلاق امرأتي ان شاءت او هويت او 1686
ارادت لم يكن وكيلا حتى تشاء المرأة في مجلسها - لانه علق التوكيل
بمشيتها فيقتصر على مجلس العلم - كما لو علق الطلاق بمشيتها - و اذا
شاءت في المجلس يصير وكيلا - و ان قام الوكيل عن المجلس قبل ان
تطلق تبطل الوكالة - و قال بعض العلماء رح لا تبطل - لان المعلق
بالشرط عند وجود الشرط كالمرسل فيصير كانه قال بعد مشيئتها انت
وكيلي في طلاقها فلا يقتصر على المجلس - قالوا الصحيح جواب الكتاب
لان ثبوت الوكالة بالطلاق بناء على ما فوض اليها من المشيئة و مشيئتها
تقتصر على المجلس فكذلك الوكالة *

١٦٨٧ و لو قال لغيره انت وكيلي في طلاق امرأتي ان شئت فشاء في 1687
المجلس فهو جائز - و ان قام الوكيل عن المجلس قبل ان يشاء بطل
التوكيل - لان تعليق الوكالة بالمشيئة يكون تمليكا بتعليق[٣] الطلاق بالمشيئة *

١٦٨٨ رجل قال لغيره انت وكيلي في طلاق امرأتي على اني بالخيار ثلثة 1688
ايام جازت الوكالة و بطل الخيار - و كذا لو شرط الخيار لغيره في الوكالة
جازت الوكالة و بطل الخيار - و كذا لو وكل بما سوى الطلاق و شرط الخيار

(٢ ن) فتزوجها * (٣ ن) كتعليق الطلاق *

عن جميع الوكالات ينعزل و ينصرف ذلك الى المعلق و المنجز - و قال بعضهم يقول عزلتك كما وكلتك - و قال بعضهم يقول رجعت عن الوكالات المعلقه و عزلتك عن الوكالات المطلقة *

۱۶۷۹ مبتوتة وكلت زوجها المطلق ليراجعها بنكاح جديد فقال الوكيل 1679 بمحضر من الشهود فلانه را باز آورد بمائة دينار قال ابو القاسم الصفار رح يصح النكاح - قال و قوله باز آورد و قوله باز آوردم سواء *

۱۶۸۰ رجل وكل رجلا بطلاق امرأتيه فطلق احدٰهما طلقت - لانه الى 1680 ببعض ما امر به *

۱۶۸۱ رجل وكل رجلا ليطلق امرأته للسنة فطلقها في غير وقت السنة 1681 لا يقع للحال و لا اذا جاء وقت السنة - و لا يخرج عن الوكالة حتى لو طلقها بعد ذلك في وقت السنة يقع الطلاق *

۱۶۸۲ رجل وكل رجلا بطلاق امرأته ثم طلقها الموكل بائنا او رجعيا ثم طلقها 1682 الوكيل فطلاق الوكيل واقع ما دامت في العدة - و لا ينعزل بابانة الموكل اذا لم يكن طلاق الوكيل بمال - فان لم يطلقها الوكيل حتى تزوجها الموكل قبل انقضاء العدة ثم طلقها الوكيل يقع طلاقه عليها - فان كان الموكل تزوجها بعد انقضاء العدة ثم طلقها الوكيل لا يقع طلاق الوكيل - و كذا لو ارتد الزوج او المرأة و العياذ بالله ثم طلقها الوكيل فطلاق الوكيل واقع ما دامت في العدة - و ان لحق الموكل بدار الحرب مرتدا و قضى القاضي بلحاقه بطلت الوكالة حتى لو عاد مسلما و تزوجها ثم طلقها الوكيل لا يقع طلاق الوكيل - و لو ارتد الوكيل و العياذ بالله كان على الوكالة و ان لحق بدار الحرب الا ان يقضي القاضي بلحاقه - لان قضاء القاضي باللحاق بمنزلة الموت *

لانه اخرج الكلام جوابا في خطاب الامر و الجواب يتضمن اعادة ما في السوال *

١٦٧٦ رجل قال لغيره طلق امرأتي هذه او اعتق عبدي هذا او دبره فقبل 1676
الوكيل و غاب الموكل لا يجبر الوكيل على الطلاق و العتاق و غيره الا
في فصل[٢] رجل قال لغيره ادفع هذا الثوب الى فلان فانه يجبر المامور
على دفع الثوب - لان في الثوب و الشيئ المعين يجوز ان يكون الثوب
امانة عند الآمر فيجب عليه تسليم الامانة - اما في الطلاق و العتاق
و غير ذلك انما امره بالتصرف في ملك الآمر و ليس على الآمر
ايقاع الطلاق و العتاق فلا يقع[٣] على الوكيل *

١٦٧٧ رجل اراد السفر فوكل رجلا بطلاق امرأته ثم عزله بغير محضر من 1677
المرأة ان لم يكن التوكيل بطلب المرأة صح عزله - و ان كان بطلب
المرأة قال بعضهم لا يملك عزله الا بمحضر منها - كما لو وكل رجلا بالخصومة
بطلب الخصم فانه لا يملك العزل بغير محضر من الخصم - و قال
الشيخ الامام شمس الائمة السرخسي رح الصحيح انه يملك عزل
الوكيل بالطلاق و ان كان بطلب المرأة - لان الطلاق لا يجب على الزوج
بطلب المرأة - فيملك الزوج اخراج الوكيل عن الوكالة *

١٦٧٨ و لو وكل رجلا بالطلاق و قال كلما عزلتك فانت وكيلي قال بعضهم 1678
لا يصح هذا التوكيل - لان فيه تغيير حكم الشرع وهو الزام ما ليس بلازم
و قال بعضهم يصح التوكيل و لا يملك عزله - لانه كلما يعزله يتجدد الوكالة
و قال الشيخ الامام شمس الائمة السرخي رح الصحيح انه يملك العزل
ثم اختلفوا في طريق العزل قال الشيخ الامام هذا رح اذا قال عزلتك

(٢ ن) في فصل و هو ما اذا قال رجل لغيره الخ * (٣ ن) فلا يجب *

١٦٧٢ رجل قال لامرأته امرك بيدك في هذ السنة ثم طلقها زوجها واحدة 1672
قبل الدخول بها ثم تزوجها في تلك السنة ذكر الكرخي رح ان الامر
يكون بيدها في تلك السنة في قول ابي حنيفة رحمه الله تعالى *

١٦٧٣ رجل وكل رجلا بطلاق امرأته فطلقها الوكيل في سكرة اختلفوا فيه - قال 1673
بعضهم لا يقع الطلاق كما لو وكل رجلا بالطلاق فجن الوكيل و طلق
و الصحيح انه يقع الطلاق *

١٦٧٤ رجل قال للآخر وكلتك في جميع اموري فطلق الوكيل امرأته اختلفوا 1674
فيه - و الصحيح انه لا يقع - و في الفتاوي للفقيه ابي جعفر رح رجل
قال لغيره وكلتك في جميع اموري و اقمتك مقام نفسي لم تكن الوكالة
عامة - فان كان امر الرجل مختلفا ليست له صناعة معروفة فالوكالة
باطلة - و ان كان الموكل تاجرا ينصرف التوكيل الى التجارة - قال رح
و لو قال وكلتك في جميع اموري التي يجوز بها التوكيل كانت الوكالة
عامة في البياعات و الاجارات و الانكحة و كل شيء - و عن محمد رح
لو قال هو وكيلي في كل شيء جائز صنعته كان وكيلا في البياعات و
الهبات و الاجارات - و عن ابي حنيفة رحمه الله تعالى انه يكون وكيلا
في المعاوضات دون الهبة و العتاق - و قال[٢] مولانا رضي الله عنه و هذا كله
اذا لم يكن في حال مذاكرة الطلاق - فان كان في حال مذاكرة الطلاق يكون
وكيلا بالطلاق *

١٦٧٥ رجل اكرهه السلطان ليركله بطلاق امرأته فقال الرجل مخافة الضرب 1675
و الحبس انت وكيلي و لم يزد على ذلك فطلق الوكيل امرأته ثم
قال الموكل لم اوكله بطلاق امرأتي قالوا لا يسمع منه ذلك و يقع الطلاق

(٢ ن) قال رحمه الله *

يقع واحدة رجعية - و لو قال الوكيل ابنتها لا يقع شيئ - و كذا لو قال للوكيل طلقها تطلقية بائنة فقال لها الوكيل انت طالق تطليقة رجعية يقع واحدة بائنة *

١٦٦٧ رجل قال لغيره طلق امرأتي بين يدي اخي فلان فطلقها بغير محضر من الاخ يقع الطلاق - لان قوله بين يدي اخي خرج على وجه المشورة فلا يتعلق به الطلاق - كما لو قال طلقها بين يدي الشهود فطلقها بغير محضر من الشهود يقع و هو كما لو وكل غيره ببيع عبده و قال بعه بشهود فباع بغير شهود جاز - بخلاف ما لو قال لا تبعه الا بشهود فانه لا يجوز البيع الا بشهود * 1667

١٦٦٨ رجل قال لغيره لا انهاك عن طلاق امرأتي لم يكن ذلك توكيلا - و لو قال لعبده لا انهاك عن التجارة يكون اذنا في التجارة - لان قوله للعبد ذلك لا يكون بدون ما رآه يبيع و يشتري و لم ينه و ثمه يصير ماذونا في التجارة فههنا[٢] اولى - و لو رأى انسانا يطلق امرأته فلم ينهه لا يصير المطلق وكيلا و لا يقع الطلاق فكذلك ههنا * 1668

١٦٦٩ رجل قال لامرأته امرك بيدك[٣] فقالت اخترت نفسي تكلموا فيه قال بعضهم يقع الطلاق - لان هذا الكلام فوق تفويض الطلاق اليها - و هذا الجواب انما يصح اذا نوى تفويض الطلاق اليها - فان جعل امرها بيدها لا يكون تفويضا للطلاق الا بالنية * 1669

١٦٧٠ اذا جعل امر امرأته بيد مجنون اوصبي يعقل صح - و ليس للزوج ان يرجع عنه * 1670

١٦٧١ رجل جعل امر امرأته بيد رجلين لا يتفرد احدهما بالطلاق * 1671

(٢ ن) فهذا اولى * (٣ ن) امري بيدك *

قال لها طلقي نفسك و لم ينو العدد فقالت طلقت نفسي ثلثا لا يقع شيئ في قول ابي حنيفة رحمة الله تعالى - و يقع واحدة في قول صاحبيه رح - و لا يقال قول الزوج بعد قولها طلقت نفسي ثلثا نجوت لم لا يكون اجازة لفعل المرأة - لانا نقول قول الرجل(٢) نجوت يحتمل الاستهزاء فلا يجعل اجازة بالشك *

١٦٦٢ امرأة قالت لزوجها من وكيل تو هستم فقال هستي فقالت طلقت 1662 نفسي ثلثا فقال الزوج بالفارسية تو بر من حرام گشتي ما را جدا بايد شد فتفرقا ثم اراد الزوج ان يراجعها قالوا يسأل عن نيته ان قال عنيت به التوكيل بالطلاق و لم انو العدد تبين بواحدة - فهذا الجواب انما يصح على قول ابي يوسف و محمد رح - و اما على قول ابي حنيفة رحمه الله تعالى قالوا لا يقع شيئ - و عليه الفتوى *

١٦٦٣ امرأة قالت لزوجها اتريد ان اطلق نفسي فقال نعم فقالت طلقت 1663 نفسي ان كان الزوج نوى تفويض الطلاق اليها طلقت واحدة - و ان عنى بذلك طلقي نفسك ان استطعت لا تطلق *

١٦٦٤ رجل قال لغيره اتريد ان اطلق امرأتك ثلثا فقال الزوج نعم فقال 1664 الرجل طلقت امرأتك ثلثا قالوا تطلق ثلثا - و الصحيح ان هذا و ما تقدم سواء انما يقع الطلاق اذا اراد الرجل(٣) تفويض الطلاق اليه *

١٦٦٥ رجل وكل غيره بالطلاق فطلقها الوكيل ثلثا ان كان الزوج نوى بالتوكيل 1665 التوكيل بالثلث طلقت ثلثا - و ان لم ينو الثلث لا يقع شيئ في قول ابي حنيفة رحمه الله تعالى *

١٦٦٦ رجل قال لغيره طاق امرأتي رجعية فقال لها الوكيل طلقتك بائنة 1666

(٢ ن) الزوج * (٣ ن) الزوج *

دعيت بطعام فاكلت او امتشطت او اغتسلت او اختضبت او جامعها زوجها او قامت عن مجلسها بطل الخيار - و كذا لو افتتحت الصلوة و ان كان في صلوة الفرض لا يتم الامر حتى تتمها - و ان كان في التطوع لا يبطل الا ان تقوم الى الشفع الثاني *

1658 ١٦٥٨ و لو اجتمع اولياء المرأة و طلبوا طلاقها فطال كلامهم فقال الزوج لاب المرأة ما تريد مني افعل ما تريد و خرج الزوج فطلق الاب ابنته في المجلس لا تطلق - لان كلام الزوج محتمل يحتمل تفويض الطلاق اليه و يحتمل غيره فلا يكون تفويضا بالشك *

1659 ١٦٥٩ امرأة قالت لزوجها في الخصومة ان كان ما في يدك في يدي استنقذت نفسي فقال الزوج الذي في يدي في يدك فقالت المرأة طلقت نفسي ثلثا فقال لها الزوج قولي مرة اخرى فقالت طلقت نفسي ثلثا فقال الزوج لم انو الطلاق بقولي الذي في يدي في يدك فانها تطلق ثلثا بقول المرأة في المرة الثانية طلقت نفسي ثلثا حتى لو لم يقل لها الزوج قولي مرة اخرى كان القول قوله قضاء و ديانة و لا تطلق امرأته *

1660 ١٦٦٠ رجل قال لامرأته قولي انا طالق لا يقع الطلاق ما لم تقل المرأة ذلك بخلاف ما لو قال الرجل قل لامرأتي انها طالق فانها تطلق للحال و قد ذكرنا *

1661 ١٦٦١ رجل جرى بينه و بين امرأته كلام فقالت المرأة اللهم نجني منه فقال الزوج تريدين النجاة مني فامرك بيدك و نوى به الطلاق و لم ينو العدد فقالت طلقت نفسي ثلثا فقال الزوج نجوت لا يقع عليها شيء في قول ابي حنيفة رحمه الله تعالى - لانه اذا لم ينو الثلث صار كانه

في اليـــــوم ابطلـــــت كل ذلك *

1652 ١٦٥٢ و لو قال لها امرك بيدك اليوم و غدا فردت في اليوم بطل الامر - لان المعتبر هو الوقت الذي تفوه به اولا فيبطل بالرد - كما لو قال انت طالق اليوم غدا كان ايقاعا للحال *

1653 ١٦٥٣ رجل قال لامرأته امرك بيدك و امر امرأتي فلانة بيدك فقالت طلقت فلانة ثم طلقت نفسها صح - لان الكل تفويض واحد فبايتهما بدأت لا يبطل الآخر *

1654 ١٦٥٤ رجل جعل امر امرأته بيدها فقالت اعطني كذا ان طلقتني فقال الزوج لا ادري هذا فقالت المرأة ان جعلت امري بيدي فقد طلقت نفسي لا تطلق - لانها لما اشتغلت بطلب المال بطل الامر *

1655 ١٦٥٥ رجل قال لامرأته امر ثلث تطليقاتك بيدك فقالت المـــرأة لِمَ لا تطلقني بلسانك لم يكن ذلك ردا و كان لها ان تطلق نفسها *

1656 ١٦٥٦ رجل قال لامرأته ان دخلت دار فلان فامرك بيدك فدخلت و طاقت نفسها ان طلقت نفسها حين وصلت الى مكان تصير داخلة في الدار و لم تزائل ذلك المكان طلقت - و ان مشت عن ذلك المكان خطوتين ثم طلقت نفسها لا تطلق *

1657 ١٦٥٧ رجل جعل امر امرأته بيدها او خيرها و هي راكبة فنزلت او كانت نازلة فركبت بطل خيارها - و كذا لو كانت جالسة فاضطجعت للنوم و ان كانت قائمة فقعدت او كانت متكئة فاستوت قاعدة لا يبطـــل خيارها - و لو كانت قاعدة فاتكأت لا يبطل خيارها في قول زفر رح و هو احدى الروايتين عن ابي يوسف رح - لان القعود و الاتكاء يكون لجمع الراي لا للاعراض - و لو قرأت شيئا قليلا لا يبطل خيارها - و لو

مرة واحدة في ذلك المجلس و غيره - و لو[٢] اختارت زوجها خرج الامر من يدها - و لا يبطل بالقيام عن المجلس *

1647 ١٦٤٧ و لو قال لها امرك بيدك كلما شئت كان الامر بيدها كلما شاءت حتى يتم الثلث - فان تزوجت بعد الثلث بزوج آخر ثم عادت الى الاول لا يكون الامر بيدها - و لو شاءت مرة واحدة و طلقت ثم تزوجها بعد العدة كان لها المشيئة فيما بقي من الثلث - و لو شاءت مرة واحدة و طلقت ثم تزوجت بزوج آخر بعد انقضاء العدة ثم عادت الى الزوج الاول كان لها المشيئة في ثلث تطليقات مستقبلات في قول ابي حنيفة و ابي يوسف رحمهما الله تعالى - و هي مسئلة الهدم *

1648 ١٦٤٨ و لو قال لها امرك بيدك في هذه السنة فطلقت نفسها ثم تزوجها لم يكن[٣] لها الخيار في قول ابي يوسف رح - قال ابو يوسف رح و في قياس قول ابي حنيفة رح لها الخيار *

1649 ١٦٤٩ و لو قال لها امرك بيدك في هذه السنة ثم طلقها واحدة قبل الدخول بها ثم تزوجها في تلك السنة كان لها الخيار في قول ابي حنيفة رحمه الله تعالى *

1650 ١٦٥٠ رجل قال لامرأته امرك بيدك اليوم و غدا و بعد غد فردت في اليوم بطل كله - و ليس لها ان تختار نفسها بعد ذلك - و ذكر في الواقعات لها ان تختار نفسها في الغد و الصحيح هو الاول *

1651 ١٦٥١ و لو قال لها امرك بيدك اليوم و بعد غد فردت في اليوم كان لها الخيار بعد غد في قول ابي حنيفة رحمه الله تعالى - و كذا لو قالت

(٢ ن) فان اختارت * (٣ ن) لم يكن لها الخيار في قول ابي يوسف رحمه الله و في قياس قول ابي حنيفة رحمه الله تعالى لها الخيار *

١٦٤٠ رجل قال لامرأته امر نسائي بيدك او قال لها طلقي اية نسائي شئت 1640
فطلقت نفسها لا يقع و قد ذكرنا *

١٦٤١ رجل قال لامرأته امر ثلث تطليقات بيدك ان ابرأتني عن مهرك 1641
و قالت وكلني على ان اطلق نفسي فقال لها انت وكيلي لتطلقي
نفسك فقامت عن مجلسها خرج الامر من يدها حتى لو طلقت
نفسها لا يقع - لان توكيل المرأة بطلاقها تفويض فيقتصر على المجلس - و ان
طلقت نفسها في المجلس ان ابرأته عن المهر اولا طلقت - و ان لم تبرأه
لا تطلق - لان التوكيل كان معلقا بشرط البراءة *

١٦٤٢ رجل قال لامرأته امرك بيدك الى عشرة ايام يكون الامر بيدها 1642
من وقت التكلم الى عشرة ايام بالساعات - لان الامر بيدها مما يحتمل
التوقيت و كانت كلمة الى للغاية - بخلاف ما لو قال انت طالق الى
عشرة ايام فانها تطلق بعد عشرة ايام - لان الطلاق مما لا يحتمل التوقيت
فكانت كلمة الى بمعني بعد *

١٦٤٣ و لو قال لها امرك بيدك الى عشرة ايام و نوى ان يصير الامر بيدها 1643
بعد عشرة ايام صحت نيته فيما بينه و بين الله تعالى - لانه نوى ما
يحتمله لفظه الا انه خلاف الظاهر فلا يصدق قضاء *

١٦٤٤ و كذلك لو قال لغيره امر امرأتي بيدك الى سنة كان الامر بيده الى 1644
سنة و لا يبقي بعد مضي السنة علم بذلك او لم يعلم *

١٦٤٥ و لو جعل امرها بيدها شهرا او سنة فردت الامر او اختارت زوجها او 1645
قالت لا اختار الطلاق بطل الامر بيدها - و قال ابو يوسف رح يكون
الامر بيدها في مجلس آخر *

١٦٤٦ و لو قال لها امرك بيدك اذا شئت او متى شئت كان الامر بيدها 1646

لا يصدق قضاء - لان قوله هشته و حرامي طلاق فلا يصدق - قالوا و تطلق ثلثا - لان الواقع بقوله هشته رجعية فاذا كرر ذلك يقع رجعيتان - و يقع الثلث بقوله حرامي حرامي *

فصل فى الطلاق الذي يكون من الوكيل او من المرأة *

1637 ١٦٣٧ رجل جعل امر امرأته بيدها فى الطلاق فقالت لزوجها طلقتك كان باطلا كما لو اضاف الزوج الطلاق الى نفسه - و لو قالت فى المجلس انت علي حرام او قالت انت مني بائن او قالت انا عليك حرام او قالت انا بائن منك بانت بتطليقة كما لو اضاف الزوج الحرمة الى نفسه - و لو قالت انت بائن و لم تقل مني او قالت انت حرام و لم تقل علي كان باطلا - لان بينونة المرأة و الحرمة عليها غالبا لا تكون الا بزوال ملك النكاح فيقع به الطلاق بخلاف البينونة المطلقة و الحرمة المطلقة - و لو قالت دست بازداشتم و لم تقل خويشتن را لا تطلق كما لو قال لها اختاري و نوى الطلاق فقالت اخترت لا يقع به الطلاق *

1638 ١٦٣٨ و لو قال لها اختاري فقالت اخترت ثم قالت عفيت نفسي ان كان ذلك فى المجلس طلقت و صدقت - و ان قالت بعد القيام عن المجلس لا تطلق و لا يقبل قولها - لانها تملك الانشاء ما دامت فى المجلس فيقبل قولها بخلاف ما بعد القيام عن المجلس *

1639 ١٦٣٩ رجل جعل امر امرأته بيدها لا يصير الامر بيدها ما لم تعلم حتى لو طلقت نفسها قبل العلم لا يقع *

الثانية اليمين و في الثالثة الكذب قالوا طلقن ثلثا - قال[٢] رضي الله تعالى عنه و ينبغي ان يكون هذا على قول ابي يوسف رح - و اما في قياس قولهما فهو علي ما نوى *

1632 ١٦٣٢ رجل في يده دراهم فقال هذه الدراهم علي حرام ثم اشتري بها شيئا حنث - و ان وهبها او تصدق بها لا يحنث - لانه لم يرد بهذا التقدير تحريم جميع التصرفات و انما يراد به ما يختص بالدراهم غالبا و هو الشراء *

1633 ١٦٣٣ و لو قال[٣] هذا الخمر علي حرام ثم شربها اختلف فيه ابو حنيفة و ابو يوسف رحمهما الله تعالى - فقال احدهما يلزمه الكفارة - و قال الآخر لا يلزمه - لانه اخبر عما هو صادق فيه - و الفتوى على انه ينوي في ذلك - ان اراد به الخبر لا يلزمه الكفارة - و ان اراد به اليمين تلزمه[٤] و عند عدم النية لا يلزمه الكفارة *

1634 ١٦٣٤ رجل قال[٥] حلال الله علي حرام ثم قال و هرچه بدست راست گيرم برمن حرام اگر فلان كار كرده ام و قد كان فعل ذلك قالوا بانت منه بواحدة - لان التعليق بامر في الماضي تنجيز - فاذا بانت بالاولى لا يلحقها الثانية - و ان كان التعليق بامر في المستقبل ثم با شر الشرط يقع عليها طلاقان *

1635 ١٦٣٥ رجل قال لامرأته في حالة الغضب او الرضا انت علي حرام فاختلفوا فيه يقع عليها واحدة بائنة نوى الطلاق او لم ينو *

1636 ١٦٣٦ و لو قال لامرأته هشته هشته حرامي حرامي و قال ما اردت به الطلاق

(٢ ن) قال المصنف رحمه الله تعالى * (٣ ن) و لو قال هذا الخمر علي حرام ثم اشتري بها شيئا حنث ثم شربها اختلف فيه الخ * (٤ ن) تلزمه الكفارة * (٥ ن) قال لامرأته حلال الله الخ *

١٦٢٦ رجل قال لامرأته انت علي حرام و عنده الحرام طلاق الا انه لم ينو 1626
الطلاق طلقت امرأته - لانه لما كان طلاقا عنده كان ناويا به الطلاق - و لو
قال لامرأته انت معي في الحرام فهو كقوله انت علي حرام يحرم
عليه امرأته *

١٦٢٧ و لو قال لامرأته ان فعلت كذا فانت امي و نوى به التحريم فهو باطل 1627
لا يلزمه شيئ *

١٦٢٨ رجل قال زن من حرام است و اگر نه حرام است وی كافر است 1628
و لم ينو شيئا قالوا يكون موليا - و انما قالوا ذلك بناء على جواب الكتاب
فان في جواب الكتاب اذا قال لامرأته انت علي حرام يكون موليا
و في العرف هذا طلاق فلا يكون موليا *

١٦٢٩ رجل قال لامرأته مرتين انت علي حرام و نوى بالاول الطلاق و بالثانية 1629
اليمين فهو على ما نوى - لان عند تعذر اللفظ يمكن تصحيح النية *

١٦٣٠ و لو قال لامرأتين له انتما علي حرام و نوى الثلث في احدهما 1630
و الواحدة في الاخرى فهما طالقان ثلثا في قول ابي يوسف رح
و قال ابو حنيفة رحمه الله تعالى هو على ما نوى - و عليه الفتوى - قال (٢)
مولانا رضي الله تعالى عنه و ينبغي ان يكون قول محمد رح كقول
ابي حنيفة رحمه الله تعالى - اصل المسئلة اذا نوى بالنذر (٣) اليمين
و النذر جميعا - و لو قال نويت الطلاق في احدهما و في الاخرى
اليمين عند ابي يوسف رح يقع الطلاق عليها - و عندهما ينبغي ان
يكون كما نوى *

١٦٣١ و لو قال لثلث انتن علي حرام و نوى الثلث في الواحدة و في 1631

(٢ ن) قال المصنف رحمه الله ينبغي * (٣ ن) بالنذر النذر و اليمين *

منه امرأته بتطليقة واحدة - و ان نوى ثلثا فثلث - و ان قال لم انو به الطلاق لا يصدق قضاء - لانه صار طلاقا عرفا - و لهذا لا يحلف به الا الرجال فان كانت له امرأة واحدة تبين بتطليقة واحدة - و ان كن ثلثا و اربعا يقع على كل واحدة واحدة بائنة *

1623 ١٦٢٣ و ان حلف بهذا اللفظ ان كان فعل كذ او قد كان فعل و له امرأة واحدة لو نسوة بِرَنَّ جميعا - و ان لم يكن له امرأة لا يلزمه شيئ - لانه جعل يمينا بالطلاق - و لو جعلناه يمينا بالله فهي غموس *

1624 ١٦٢٤ و ان حلف بهذا على امر في المستقبل ففعل ذلك الفعل و ليست له امرأة كانت عليه كفارة اليمين - لان تحريم الحلال يمين - و لهذا لو قال لغيره حرام است مرا با تو سخن گفتن ثم كلمه كانت عليه كفارة اليمين كما لو قال و الله لا اكلم فلانا - و ان كانت له امرأة وقت اليمين فمانت قبل الشرط او بانت لا الى عدة ثم باشر الشرط لا يلزمه الكفارة - لان يمينه انصرفت الى الطلاق وقت وجودها - و ان لم يكن له امرأة وقت اليمين فتزوج امرأة ثم باشر الشرط اختلفوا فيه - قال الفقيه ابو جعفر رح تبين المتزوجة - و قال غيره لا تطلق - و عليه الفتوى - لان يمينه جعلت يمينا بالله تعالى وقت وجودها فلا يصير طلاقا بعد ذلك *

1625 ١٦٢٥ و لو قال هرچه بدست راست گيرم فهو يمين بالطلاق و ان لم ينو و لو قال هرچه بدست چپ گيرم لا يكون طلاقا الا بالنية - لانه لا عرف فيه - و في الخلاصة لا يكون طلاقا و ان نوى - لانه لا عرف فيه - و لو قال هرچه بدست راست گرفته ام بر من حرام قالوا هذا كقوله هرچه بدست راست گيرم - و لو قال هرچه بدست گيرم اختلفوا فيه - قال بعضهم لايكون طلاقا الا بالنية - و قال بعضهم هو في العرف هرچه بدست راست گيرم *

١٦١٩ و لو ان امرأة مع الرجل حكما رجلا ليحكـم بينهما في هذه الحادثة 1619
ان كان الحكم حنيفا لا ينفذ حكمه - و ان كان شفعويا اختلفوا فيه - قال
بعضهم لا ينفذ حكمه - لان حكمه بمنزلة الفتوى - و الصحيح انه ينفذ حكمه
عليهما - هكذا ذكر شمس الائمة الحلواني رح ان حكم الحكم في المجتهدات
نحو الكنايات و الطلاق المضاف و غير ذلك نافذ - و ليس لاحدهما ان
يرجع عن حكمه بعد ذلك - قال رح و هذا مما يعرف و لا يفتى (٢) كيلا
يتجاسر اليه العامة - و لاجل ذلك امتنع المشائخ عن الفتوى في
جواز حكم الحكم *

١٦٢٠ و ان حكما رجلا و لم يعلما انهما حكماه في هذه الحادثة الا انهما 1620
اختصما اليه فحكم الحكم بينهما فعلى قول من يجوز حكم الحكم يجوز
ذلك - لان التحكيم يثبت (٣) بغير العلم *

١٦٢١ و لو ان الحالف تزوج امرأة و لم يرفع الامر الى القاضي حتى 1621
تزوجت المرأة بزوج آخر من غير علم الزوج الاول ثم رفعا الامر الى
القاضي و اختصما اليه فقضي القاضي ببطلان اليمين و عدم وقوع الطلاق
لا ينفذ حكمه - لان نكاح الزوج الثاني يمنعه من القضاء للاول - و ليس
فسخ يمين الحالف اولى من ابطال نكاح الثاني - و الله اعلم *

فصل في تحريم الحلال

١٦٢٢ رجل قال كل حل علي حرام او قال كل حلال الله او قال حلال المسلمين 1622
و له امرأة و لم ينو شيئا اختلفوا فيه - قال الشيخ الامام ابو بكر محمد بن
الفضل والفقيه ابو جعفر و ابو بكر الاسكاف و ابو (٤) بكر بن سعيد رح تبين

(٢ ن) و لا يفتى به * (٣ ن) بدون العلم * (٤ ن) و ابو بكر بن ابي سعيد *

ذلك فسخا في حق غيرها - حتى لو تزوج اخرى تطلق في قولهم - وكذا لو كان ذلك في نسوة - و ان عقد يمينا واحدة على كل النساء بان قال كل امرأة اتزوجها فهي طالق ففسخ اليمين في امرأة واحدة جعلوا المسئلة على الاختلاف قياسا على مسئلة ذكرها في المنتقى *

1616 ١٦١٦ رجل قال كل عبد املكه فهو حر فملك عبدا فاقام العبد بينة على يمينه و حكم القاضي بيمينه و بعتق العبد ثم ملك عبدا آخر هل يحتاج العبد الثاني الى اقامة البينة على اليمين قال على قول محمد رح لا يحتاج - و على قول ابي يوسف و هو رواية عن ابي حنيفة رحمهما الله تعالى يحتاج - و اكثر المشائخ رح في مسئلة الطلاق على قول محمد رح - هذا كما لو ادعى رجل على رجل انه وكيل فلان الغائب في جميع حقوقه و خصوماته مع الناس و للغائب على المدعى عليه كذا و اقام البينة على ذلك و قضى القاضي بالوكالة العامة فانه لا يحتاج الى اثبات الوكالة على غريم آخر *

1617 ١٦١٧ رجل قال لامرأته اذا تزوجتك فانت طالق فتزوجها و طلقها ثلثا ثم انها رفعت الامر الى القاضي ليفسخ اليمين فان القاضي لا يفسخ - لانه لو فسخ تطلق ثلثا بالتنجيز بعد النكاح فلا يفيد *

1618 ١٦١٨ و لو ان حنفيا علق الطلاق بالتزوج فتزوج امرأة فلم يرفع الامر الى القاضي لكن سال شفعوي المذهب فافتاه بعدم وقوع الطلاق لا ينبغي للحالف ان يأخذ بفتواه و يترك مذهبه - لان عليه الاخذ بقول علمائنا (٢) رحمهم الله تعالى لا بقول اصحاب الشافعي رحمهم الله تعالى - و فتواهم لا يكون حجة في حقه *

(٢ ن) علمائه *

لكن يأمر المبعوث اليه ان يسمع خصومتها و يقضي بينهما - فبعد ذلك ان كان القاضي الاول او الثاني اخذ لذلك مالا لايصح فسخه عند الكل و لا ينفذ قضاءه - و ان اخذ القاضي اجر الكتابة ان اخذ زيادة على اجر المثل فكذلك - و ان اخذ بمقدار اجر المثل فذلك لا يمنع صحة الفسخ و الاولى ان لا يأخذ - و اذا جاء الحالف الي القاضي الثاني بكتاب القاضي الاول لا يسمع الثاني كلامه و لا يفسخ الا بمحضر من الخصم فيحضر مع نفسه المرأة التي تزوجها فتدعي المرأة علي الحالف انها امرأته و انه تزوجها بمائة دينار و عليه اداء مهرها و القيام بمواجب النكاح من السكنى و النفقة و غير ذلك فيقول الرجل نعم تزوجتها بمائة دينار الا اني كنت حلفت قبل نكاحها ان تزوجت امرأة فهي طالق فتزوجتها و وقع عليها الطلاق قبل الدخول باليمين السابقة فاذا سمع كلامهما و طلبت المرأة من القاضي الحكم ببقاء النكاح يقول القاضي حكمت ببطلان اليمين التي ذكرتها و ببقاء النكاح بينكما فينفذ قضاءه و تحل المرأة للحالف - و لا يحتاج فسخه الي امضاء القاضي و ان امضى كان احوط (٢) *

١٦١٥ و ان كان الحالف عقد على هذه المرأة ايمانا بان قال لها مرارا ان 1615
تتزوجتك فانت طالق او قال كلما تزوجتك فانت طالق او قال اذا تزوجت امرأة فهي طالق قال ذلك مرارا فاذا حكم بقيام نكاح هذه المرأة تنفسخ الايمان كلها في قولهم - و لو كان قال لامرأة اذا تزوجتك فانت طالق ثم قال لامرأة اخرى اذا تزوجتك فانت طالق فتزوج واحدة منهما ففسخ القاضي اليمين في واحدة و حكم بقيام نكاحها لم يكن

(٢ ن) احفظ *

ذلك توكيلا - لان التوكيل المجهول باطل *

1610 ١٦١٠ و لو قال لرجل از براي من عقد فضولي كن قالوا يكون ذلك توكيلا اذا زوجه المامور يحنث *

1611 ١٦١١ و ان اراد الحالف ان يجيز عقد الفضولي بالفعل يجيزه بسوق مهر لا بتقبيل و لا بلمس - كيلا يكون ابتداء الفعل قبل نفاذ النكاح - و ان بعث اليها بعطية او هدية لم يكن ذلك اجازة - حتى لو اجاز بالقول بعد ذلك تطلق - و ان بعث اليها بالمهر ثم اجاز بالقول بعد ذلك لا تطلق - لان بعث الهدية و العطية ليس من خصائص النكاح و احكامه فلم يكن اجازة بخلاف سوق المهر *

1612 ١٦١٢ و لو قال لمبتوتة او لاجنبية اگر كهي ترا بزني كنذ و بمن بخشد ترا طلاق كان باطلا - لانه ما اضاف الطلاق الى سبب الملك فلم يصح اليمين *

1613 ١٦١٣ و لو قال كل امرأة تدخل في نكاحي فهي طالق فزوجه فضولي فاجاز الحالف بالفعل قالوا هذا و قوله كل امرأة اتزوجها سواء - لان لدخول المرأة في النكاح سببا واحدا و هو النكاح فكان ذكر الحكم كذكر السبب - و هو نظير ما لو ادعى ولد حرة او اقر بنسب ولد حرة كان ذلك اقرارا بنكاح الام *

1614 ١٦١٤ اما طريق فسخ اليمين لو ان حنفي المذهب قال اذا تزوجت امرأة فهي طالق ثلثا ثم جاء الي القاضي فطلب منه فسخ اليمين فان كان القاضي حنفيا لا ينبغي له ان يفسخ يمينه - لانه قضاء بخلاف رأيه - لكن ينبغي للقاضي ان كان ماذونا في الاستخلاف ان يبعث الحالف الى شفعوي المذهب و لا يأمر المبعوث اليه بفسخ اليمين - لانه كما لايجوز للقاضي ان يقضي بخلاف رأيه لاينبغي له ان يأمر غيره بذلك

الاول و الجزاء فينبغي ان لا يصح اليمين في قول ابي حنيفة رضي الله تعالى عنه - كما لو قال لعبده انت حر و حر ان شاء الله او قال لامرأته انت طالق ثلثا و ثلثا ان شاء الله يصير المكرر فاصلا بين الاستثناء و بين اللفظ الاول و لا يصح الاستثناء و ينزل الطلاق و العتاق - و الصحيح ما قال مشائخنا رح - لان تصحيح الكلام واجب ما امكن و امكن تصحيحه بان يجعل الثاني تاكيدا لما افاده الاول - و لو كان لغوا فليس كل لغو يكون فاصلا - الا يرى ان الرجل قال لامرأته الحاضرة انت طالق يا فلانة ان دخلت الدار يصح اليمين و لا يصير الفداء فاصلا *

1607 ١٦٠٧ و لو قال هر زني كه بخواهد و بود و باشد بطلاق كه فلان كار نكند قالوا ههنا احد الالفاظ الثلثة يكون لغوا - و يصير فاصلا عند الكل - لكن هذا اذا لم ينو باحد اللفظين الآخرين الحالية - فان نوى ذلك ينبغي ان يصح نيته و يصح اليمين *

1608 ١٦٠٨ و في الموضع الذي يصح تعليق الطلاق بالتزوج لو اراد ان تدخل في نكاحه امرأة و لا تطلق فله طريقان - احدهما نكاح الفضولي و الاجازة بالفعل - والثاني فسخ اليمين - و الاول في زماننا اولى - و هذا ظاهر - و ان (٢) اراد الحالف ان يزوجه فضولي فجاء الى عالم و قال من سوگند خورده‌ام بريں بدينوجه و بنكاح فضولي حاجت است مرا فزوجه العالم امرأة فاجاز الحالف بالفعل لا يحنث - و كذا لو قال الحالف لجماعة مرا بنكاح فضولي حاجت است فزوجه واحد من الجماعة امرأة و اجاز الحالف بالفعل *

1609 ١٦٠٩ و كذا لو قال (٣) لجماعة كسي ميبايد كه مرا زني خواهد بجوز و لا يكون

(٢ ن) فان اراد * (٣ ن) لو قال الحالف لجماعة *

١٦٠٣ رجل حلف ان لا يزوج ابنته الصغيرة فزوجها فضولي فاجاز الاب بالفعل لا يحنث - كما لو حلف ان لا يبيع فباعه بغير امره غيره و قبض الحالف الثمن لا يحنث في يمينه * 1603

١٦٠٤ رجل قال لامرأته كل امرأة اتزوجها فقد بعت طلاقها منك بدرهم ثم تزوج امرأة فقالت التي كانت عنده حين علمت بنكاح غيرها قبلت او قالت طلقتها او قالت اشتريت طلاقها طلقت التي تزوجها و ان قالت التي كانت عنده قبل ان تزوج الاخرى قبلت لا يصح قبولها - لان ذلك قبول قبل الايجاب * 1604

١٦٠٥ رجل قال هر زني كه ورا بود تا سي سال از وي بطلاق و نوي ما يستفيد بعد اليمين او لم ينو شيئا لا تطلق التي كانت عنده وقت اليمين - لان المراد من هذا في العرف ما يستفيذ بعد اليمين - قال الفقيه ابو الليث رح قوله كل امرأة تكون لي و قوله كل امرأة اتزوجها سواء - و ان نوى من كانت في نكاحه و من يتزوجها بعد اليمين في تلك المدة صحت نيته - لانه نوى من يكون في نكاحه وقت الشرط ان كانت اليمين معلقة و ان نوي الحالية غير ما يستفيد بعد اليمين دخلت الحالية في يمينه بحكم النية و من يتزوجها بعد ذلك بحكم ظاهر اللفظ - لان هذا الكلام يتناول ما يستفيد ظاهرا فلا يملك صرف اليمين عما يستفيد - و كذا لو قال هر زني كه او را بود و لم يوقت * 1605

١٦٠٦ و لو قال هر زني كه او را بود و باشد قال مشائخنا و مشائخ بلخ رح هذا و الاول في الوجوه سواء - لان قوله و باشد تاكيد لافادة اللفظ الاول فلا يتغير به حكم الاول - و قال مشائخ سمرقند رح لا ينعقد هذه اليمين لان اللفظ الثاني لا يفيد الا ما افاده الاول فيلغو و يصير فاصلا بين اللفظ 1606

١٥٩٨ و لو قال كل امرأة اتزوجها ما لم اتزوج فاطمة فهي طالق فماتت فاطمة او غابت فتزوج غيرها طلقت في الغيبة - و لا تطلق في الموت - اما في الغيبة لانه تزوج غير فاطمة حال بقاء اليمين فيحنث في يمينه و في الموت لا يحنث في قول ابي حنيفة و محمد رحمهما الله تعالى لان عندهما يمينه تبطل بالموت فلا يحنث بعد ذلك * 1598

١٥٩٩ رجل قال ان تزوجت فلانة فهي طالق فزوجها منه فضولي بغير اذنها ثم اجاز المرأة بعد ذلك طلقت - و قيل ينبغي ان لا تطلق - لانه حنث بعقد الفضولي و المرأة ليست في نكاحه قبل الاجازة فتحل اليمين لا الى جزاء فلا تطلق - و الصحيح انها تطلق - لان نكاح الفضولي لا يتم قبل الاجازة فلا يحنث قبل الاجازة - و لهذا لو حلف ان لا يتزوج فتزوج امرأة زوجها منه فضولي لا يحنث قبل الاجازة * 1599

١٦٠٠ رجل حلف ان لا يتزوج فلانة او حلف ان لا يتزوج امرأة فتزوج امرأة نكاحا فاسدا ثم فارقها ثم تزوجها نكاحا جائزا كان حانثا - لان بالنكاح الفاسد لم يحنث فيحنث بالنكاح الصحيح * 1600

١٦٠١ رجل حلف ان لا يتزوج امرأة ثم جن فزوجه ابوه امرأة لا يحنث الحالف - بخلاف ما لو وكل رجلا بالنكاح ثم حلف ان لا يتزوج ثم زوجه وكيله امرأة كان حانثا * 1601

١٦٠٢ رجل قال اگر من دختر خويش را بكسى دهم بزني يا روا دارم تا ويرا بكسي دهند فعليه كذا فالحيلة في ذلك ان توكل البنت(٢) رجلا بالنكاح ان كانت بالغة فيزوجها الوكيل و يقول الاب لا اجيز ما يصنعون فيجوز النكاح فلا يحنث الاب * 1602

(٢ ن) الابنة *

اخوة فلان و كلم احدهم لا يحنث *

1590 رجل حلف ان لا يتزوج امرأة فتزوج صبية حنث في يمينه - و لو حلف ان لا يكلم امرأة و كلم صبية لا يحنث في يمينه *

1591 رجل قال ان تزوجت امرأة كان لها زوج فهي طالق فطلق امرأته بائنا ثم تزوجها لا تطلق - لان الحامل على اليمين غيظ لحقه من جهة الزوج فكان اليمين على غيرها *

1592 وكذا لو حلف ان لا يطأ امرأة وطئها رجل كان له ان يطأ نساءه و اماءه *

1593 رجل حلف ليتزوجن سرا فتزوج امرأة بشهادة شاهدين يكون سرا - لان النكاح لا ينعقد بدون الشاهدين فلا يعد هذا جهرا - لا جرم لو تزوج بشهادة ثلثة من الرجال كان حانثا *

1594 رجل قال لامرأتين ان خطبتكما او تزوجتكما فانتما طالقان فخطبهما ثم تزوجهما لا يحنث لما ذكرنا في المرأة الواحدة و كذلك في المرأتين *

1595 رجل يعلم انه كان حلف بطلاق كل امرأة يتزوجها و لا يدري انه كان بالغا وقت اليمين او لم يكن فتزوج امرأة لا يحنث في يمينه لانه شك في صحة اليمين فلا يحنث بالشك *

1596 رجل قال ان تزوجت امرأة الى خمس سنين فهي طالق فتزوج امرأة في السنة الخامسة طلقت - لان اليمين لا ينتهي قبل مضي السنة الخامسة - الا يرى انه لو آجر داره الى خمس سنين كانت السنة الخامسة داخلة في الاجارة *

1597 رجل قال ان اكلت من خبز والدي ما لم اتزوج فاطمة فكل امرأة اتزوجها فهي طالق فاكل ثم تزوج فاطمة طلقت - لانه لما اكل قبل نكاح فاطمة صار قائلا عند الاكل كل امرأة اتزوجها فهي طالق فاذا تزوج فاطمة بعد الاكل طلقت *

بنت فلان فيدخل فيه الموجود لا الحادث *

1584 ١٥٨٤ و لو حلف ان لا يتزوج من نساء اهل البصرة فتزوج جارية ولدت بالبصرة و نشأت بالكوفة و اوطنت بها حنث الحالف في قول ابي حنيفة رحمه الله تعالى - لان عنده المعتبر في هذا الولادة *

1585 ١٥٨٥ رجل حلف بالفارسية ان لا يتزوج من خراد فلان فتزوج ابنة بنت فلان قالوا يحنث في يمينه - لان هذا الاسم في العرف يتناول بنت البنت كما يتناول بنت الابن *

1586 ١٥٨٦ و لو حلف ان لا يتزوج من اهل بنت فلان فتزوج بنت بنت فلان لا يحنث - لان هذا الاسم لا يتناول اولاد البنات *

1587 ١٥٨٧ رجل قال ان تزوجت امرأة ما دمت بالكوفة فهي طالق ففارق الكوفة ثم عاد اليها و تزوج امرأة لا تطلق - لان اليمين كانت موقتة ما دام بالكوفة فاذا فارق الكوفة انتهت - و ان فارق الكوفة بنفسه و بقي وطنه بها لا يحنث ايضا الا ان ينوي دوام وطنه بها *

1588 ١٥٨٨ رجل قال لابويه ان تزوجت امرأة ما دمتما حيين فهي طالق فتزوج امرأة في حيوتهما طلقت - و ان تزوج اخرى في حيوتهما لم تطلق لما ذكرنا ان قوله امرأة لا يتناول الا امرأة واحدة *

1589 ١٥٨٩ و لو قال كل امرأة اتزوجها ما دمتما حيين او قال بالفارسية هر زن كه بخواهم طلقت كل امرأة تزوجها في حيوتهما - و لن مات احد الابوين فان كان نوى ان لا يتزوج في حيوة احدهما فهو على ما نوى - و كذا لو نوى ان لا يتزوج في حيوتهما جميعا كان على ما نوى - و ان لم يكن له نية ينبغي ان لا يبقى اليمين بعد موت احدهما - كما لو حلف لن لا يتكلم (٢)

(٢ ن) لا يكلم *

حنث حيثما تزوجها *

1581 رجل قال كل امرأة تكون لي ببخارا فهي طالق فتزوج امرأة ببخارا طلقت - و ان تزوجها في غير بخارا ثم نقلها الى بخارا اختلف المشائخ رح فيه - قال بعضهم تطلق - و قال بعضهم لا تطلق - و هو الصحيح - لان في العرف يراد بهذا التزوج ببخارا *

1582 رجل قال ان تزوجت امرأة من بنات فلان فهي طالق وليس لفلان وقت اليمين بنت ثم جاءت له بنت فتزوجها الحالف قالوا لا يحنث في يمينه و يشترط قيام البنت وقت اليمين - و لا يدخل في اليمين ما يحدث بعد اليمين - كما لو حلف ان لا يتزوج من اهل هذه الدار و ليس لتلك الدار اهل ثم سكنها قوم فتزوج الحالف منهم امرأة لا يحنث في يمينه و يشترط وجود الاهل وقت اليمين الا ان هذا الجواب يوافق قول محمد رح - اما في قياس قول ابي حنيفة و ابي يوسف رحمهما الله تعالى يدخل في هذه اليمين ما كانت موجودة وقت اليمين و ما يحدث بعده - كما لو حلف ان لا يكلم ابن فلان و ليس لفلان ابن ثم ولد له ابن وكلمه الحالف يحنث في قول ابي حنيفة و ابي يوسف رحمهما الله تعالى - و لا يحنث في قول محمد رح *

1583 و لو قال و الله لا اتزوج امرأة من اهل الكـــوفة فتزوج امرأة من اهل الكوفة ولدت بعد اليمين حنث - فرق محمد رح بين هذا و بين بنت فلان - لان اهل الكوفة قوم لا يحصون فلم يكن الحامل على اليمين غيظا لحقه من جهة الاهل بل الحامل على اليمين معني في الكوفة فيدخل في هذه اليمين الموجود بعد اليمين و وقت اليمين بخلاف بنت فلان - لان ثمة الحامل على اليمين غيظ لحقه من جهة

كل امرأة بتكرار التزوج *

١٥٧٤ ولو قال هرچه‌گاه زن كنم بطلاق يقع[٢] على امرأة واحدة لا غير * 1574

١٥٧٥ و لو قال اگر فلانه را بخواهم او قال هر زني را بخواهم ان كان ذلك في 1575
موضع يريدون بهذا اللفظ التزوج يقع الطلاق - و ان كان ذلك في موضع
يريدون به الخطبة لا يصح اليمين و لا يقع الطلاق عند التزوج - و في عرفنا
يراد بهذا اللفظ التزوج دون الخطبة *

١٥٧٦ رجل قال بالفارسية اگر جز از تو زن كنم او قال اگر جز از تو مرا زن 1576
باشد فهي طالق او قال هزار طلاق داده فتزوج امرأة غيرها ثم تزوج اخرى
طلقت الاولى دون الثانية - لان قوله زن لا يتناول الا امرأة واحدة *

١٥٧٧ و لو قال اگر مرا بدين جها زن بود بسه طلاق فتزوج امرأة طلقت - فان 1577
تزوج اخرى لا تطلق - لما ذكرنا ان هذا اللفظ لا يتناول الا امرأة واحدة *

١٥٧٨ امرأة قالت لاجنبي زوجت نفسي منك فقال الرجل فانت طالق 1578
طلقت - و لو قال انت طالق لا تطلق - و لا يكون هذا الكلام قبولا للنكاح
لان هذا الكلام اخبار - اما في المسئلة الاولى جعل طلاقها جزاء لنكاحها
و طلاقها لا يكون جزاء لنكاحها الا بالقبول - فيكون كلامه قبولا للنكاح ثم
يقع الطلاق بعده *

١٥٧٩ رجل قال كل امرأة اتزوجها ابدا في قرية كذا فهي طالق ثم اخرج 1579
امرأة من تلك القرية فتزوجها لا تطلق - لانه لم يتزوجها في قرية كذا
و كذا لو لم يخرجها من تلك القرية و تزوجها في غير تلك القرية
لا يحنث - لان شرط الحنث النكاح في تلك القرية *

١٥٨٠ و لو قال كل امرأة اتزوجها من قرية كذا فتزوج امرأة من تلك القرية 1580

(٢ ن) فهذا يقع على الخ *

١٥٦٨ و لو قال كل امرأة اتزوجها ابدا او قال الى ثلثين سنة فهي طالق 1568
ان كلمت فلانا فتزوج امرأة قبل الكلام و تزوج امرأة بعده طلقت كل
امرأة يتزوجها في تلك المدة - فان لم يكن اليمين موقتة بان قال كل
امرأة اتزوجها فهي طالق ان كلمت فلانا فتزوج امرأة قبل (٢) الكلام و امرأة
بعده طلقت التي تزوجها قبل الكلام - و لا تطلق التي تزوجها بعد الكلام
و قد مرت المسئلة قبل هذا *

١٥٦٩ و لو قال ان كلمت فلانا فكل امرأة اتزوجها فهي طالق لا يقع الطلاق 1569
على التي تزوجها قبل الكلام كانت اليمين مطلقة او موقتة - فان نوى
وقوع الطلاق على التي تزوج قبل الكلام صحت نيته - لان الكلام يحتمل
التقديم و التأخير فيقع الطلاق على المتزوجة قبل الكلام بنيته - و على
التي تزوجها بعد الكلام بظاهر اللفظ فيقع الطلاق عليهما جميعا *

١٥٧٠ رجل قال اية امرأة اتزوجها فهي طالق كانت اليمين على امرأة واحدة 1570
الا ان ينوي جميع النساء *

١٥٧١ و لو قال بالفارسية هر كدام زن كه بزني (٣) كنم برو طالق فهذا على كل 1571
امرأة يتزوج - و قال بعضهم لا يقع الطلاق الا على امرأة واحدة - و جعلوا
هذا الكلام فارسية قوله اية امرأة اتزوجها - و الصحيح هو الاول *

١٥٧٢ و لو قال بالفارسية هر كدام زن كه در نكاح من آيد ينبغي ان يكون 1572
هذا على كل امرأة يتزوج في قولهم جميعا - لانه جعل النكاح صفة للمرأة
فتعم بعموم الوصف - و لو قال هرچه زن كنم يقع على كل امرأة مرة
واحدة الا ان ينوي به التكرار *

١٥٧٣ و لو قال هر بار كه زن بزني كنم يتناول كل امرأة و يتكرر الطلاق على 1573

(٢ ن) قبل الكلام وتزوج امرأة بعده * (٣ ن) بزني كنم طالق *

١٥٦٠ و لو قال لمنكوحته ان تزوجتك او قال اگر ترا بزني كنم ينصرف 1560
ذلك الى العقد *

١٥٦١ و كذا لو قال اگر ترا نكاح كنم ينصرف الى العقد و هو الصحيح - و لو 1561
قال بالعربيه ان نكحتك يقع على الوطي *

١٥٦٢ و لو قال للمطلقة طلاقا رجيعا اگر ترا بزني كنم ينصرف الى العقد 1562
فان نوى الرجعة صحت نيته - و عند الاطلاق ينصرف الى العقد *

١٥٦٣ فضولي زوج رجلا امرأة ثم حلف الرجل ان لا يتزوج امرأة ثم اجاز 1563
الحالف نكاحا باشره الفضولي قبل اليمين لا يحنث في يمينه - لان
الاجازة ليست بعقد - و لو كان حلف قبل نكاح الفضولي ان لا يتزوج
امرأة ثم زوجه الفضولي امرأة و اجاز الحالف نكاحه بالقول حنث
في يمينه - و ان اجاز بالفعل من سوق مهر و نحوه اختلفوا فيه - و اكثر
المشائخ على انه لا يحنث *

١٥٦٤ و لو وكل رجلا بان يزوجه امرأة ثم حلف ان لا يتزوج فزوجه الوكيل 1564
امرأة حنث في يمينه - لان عقد الوكيل انتقل الى الموكل بقوله فيحنث
كما لو اجاز نكاح الفضولي بالقول *

١٥٦٥ و لو ان بكرا حلفت ان لا تتزوج نفسها فزوجها وليها فسكتت روي 1565
عن محمد رح انه قال حنثت في يمينها - وجعل الاجازة بالفعل حنثا *

١٥٦٦ رجل حلف ان لا يتزوج امرأة فتزوج امرأة نكاحا فاسدا ذكر في الكتاب 1566
انه لا يحنث - قالوا هذا قول ابي يوسف و محمد رح - و اما على قول
ابي حنيفة رحمه الله تعالى يحنث - و الصحيح جواب الكتاب *

١٥٦٧ رجل قال كل امرأة اتزوجها فهي طالق و نوى من بلد كذا او نوى 1567
امرأة حبشية او غيرها لا يكون مصدقا في ظاهر الرواية قضاء *

رحمه الله اذا قال رجل ان تزوجت فلانة او خطبتها فهي طالق فخطب امرأة و تزوجها لا يحنث في يمينه - لانه حنث بالخطبة *

1554 ١٥٥٤ اذا قال للاجنبية او للمبانة اگر ترا خواهندگي كنم او قال خوارگي(٢) كنم او قال بخواهم خواستن او قال اگر بخواهم ترا طلاق فتزوجها قالوا لا تطلق امرأته - لانه يحنث(٣) بالارادة قبل النكاح - فلا يحنث بالنكاح قال قال مولانا رضي الله تعالى عنه و هذا الجواب ظاهر فيما اذا قال قبل النكاح ميخواهم كه فلانه را بخواهم فان لم يقل كذلك و كان يمينه اگر ترا بخواهم او بخواهم خواستن فهذا الجواب مشكل - لان الارادة من افعال القلب بمنزلة المشيئة و الرضاء فلا يؤخذ ما لم يتكلم به *

1555 ١٥٥٥ رجل قال اگر فلانه را بمن بزني بدهند او را طلاق قالوا لا يصح هذه اليمين - حتى لو تزوجها لا تطلق - و قال الشيخ الامام ابو بكر محمد بن الفضل رح تصح هذه اليمين و تطلق *

1556 ١٥٥٦ و كذا لو قال لوالديه ان زوجتماني امرأة فهي طالق فزوجاه امرأة بامرة قالوا لا يصح هذه اليمين و لا تطلق - و قال الشيخ الامام ابو بكر محمد بن الفضل رح تصح و تطلق - و هو الصحيح - لان التزويج لا يتم الا بالتزوج *

1557 ١٥٥٧ و لو قال اگر دختر فلانه را بمن دهند او را طلاق فزوجوها لا تطلق - و لو قال اگر مرا بدهند بزني تطلق *

1558 ١٥٥٨ و لو قال اگر فلانه را بمن بزني داده شود قالوا لا تصح - قال مولانا رضي الله تعالى عنه و ينبغي ان يصح علي قول الشيخ الامام ابي بكر محمد بن الفضل رحمه الله تعالى *

1559 ١٥٥٩ و لو قال اگر فلانه را بزني كنم او را طلاق فتزوجها تطلق *

(٢ ن) خوانگي كنم * (٣ ن) حنث *

فاذا انشق الفجر من الغد و هي في العدة يقع اخرى *

١٥٤٩ رجل قال لامرأته انت طالق ثلثا الا نصفها يقع ثنتان - و لو قال الا 1549
انصافهن يقع الثلث *

١٥٥٠ رجل قال لامرأته انت طالق لولا ابوك او قال لولا اختنـــك او قال 1550
لولا اني احبك فهو استثناء - و لا تطلق شيئا *

١٥٥١ المبطل للاستثناء خمسة - احدها ان يزيد المستثنى على المستثنى 1551
منه كقولك انت طالق ثلثا الا اربعا لا يصح الاستثناء - و الثاني استثناء
بعض الطلق نحو ان يقول انت طالق الا نصفها طلقت واحدة - و الثالث
ان يكون المستثنى مثل المستثنى منه ان يقول انت طالق ثلثا الا
ثلثا - و الرابع السكوت لا التنفس و العطاس و نحو ذلك من غير ضرورة
و ان قل - و في بعض الروايات اذا سكت مقدار التنفس و له بد من
ذلك لا يقطع الاستثناء - و الخامس ما يؤدي الى تصحيح بعض
الاستثناء و ابطال البعض كما[٢] لو قال انت طالق ثنتين و ثنتين الا ثلثا
و الله اعلم بالصواب *

مسائل تعليق الطلاق بالتزوج

١٥٥٢ رجل قال ان فعلت كذا فامرأته طالق و ليس له امرأة فتزوج امرأة ثم 1552
فعل ذلك لا يحنث في يمينه *

١٥٥٣ و لو قال ان تزوجت امرأة او امرت انسانا ليتزوج لي امرأة فهي 1553
طالق ثم امر غيره ان يتزوج له امرأة ففعل المامور لا تطلق امرأة الحالف
لانه حنث بالامر لا الى جزاء - و هو نظير ما روي عن ابي يوسف

(٢ ن) كما لو قال لامرأته انت طالق اه *

ثنتين بائنتين - و قال محمد رح طلقت واحدة *

١٥٣٨ و كذا لو قال انت طالق ثلثا بوائن الا واحدة طلقت ثنتين بائنتين * 1538

١٥٣٩ و لو قال انت طالق ثلثا بائنة الا واحدة او قال ثلثا البتة الا واحدة 1539
يقع رجعيتان *

١٥٤٠ و كذا لو قال انت طالق ثلثا الا واحدة بائنة و واحدة بتـــة يقع 1540
تطليقتان رجعيتان *

١٥٤١ و لو قال انت طالق ثلثا حراما الا واحدة طلقت ثنتين يملك الرجعة * 1541

١٥٤٢ رجل قال لامرأته اذا دخلت الدار فانت طالق ثلثا لا يقعن عليك 1542
الا بعد كلام فلان فدخلت الدار طلقت ثلثا و كلام فلان باطل *

١٥٤٣ و لو قال انت طالق اليوم ثلثا يقع عليك غدا فهي طالق اليوم ثلثا * 1543

١٥٤٤ و لو قال طالق انت اليوم ان شاء الشيطان او ان شاء الملـك 1544
لا يقع شيئ *

١٥٤٥ و لو قال انت طالق ما شاء الله كان لا يقع شيئ - و كذا لو قال انت 1545
طالق الا ما شاء الله او قال ان يشاء الله لا يقع شيئ *

١٥٤٦ اذا قال لامرأته انت طالق ثنتين لا بل واحدة طلقت ثلثا - و لو قال 1546
انت طالق لا بل طالق طلقت ثنتين - وكذا لو قال انت طالق واحدة
لا بل واحدة - و كذا لو قال انت طالق واحدة لا بل طالق واحدة *

١٥٤٧ رجل قال لامرأته انت طالق او لا شيئ كان باطلا - فان قال انا اوقع 1547
الطلاق الذي قلت طلقت الساعة - و هو نظير ما لو طلق رجل امرأته
فقال رجل آخر انا اوقع طلاق فلان الذي اوقعه على امرأته طلقت
امرأة القائل *

١٥٤٨ رجل قال لامرأته انت طالق واحدة لا بل غدا طلقت للحال واحدة 1548

١٥٣١ رجل قال لغيره لاجيئنك[٢] الى عشرة ايام الا ان اموت و نوى بقلبه 1531
ان لم يمت ابدا فان كانت يمينه بالله لا يحنث - و ان كان بطلاق او
عتاق لا يصدق قضاء *

١٥٣٢ رجل[٣] قال لامرأته انت طالق ثنتين و واحدة الا واحدة يقع ثنتان 1532
لان الجمع بين الواحدة و الثنتين بحرف الجمع كالجمع بلفظ الجمع
فصار كانه قال انت طالق ثلثا الا واحدة فيقع ثنتان *

١٥٣٣ و لو قال لامرأته انت طالق ثلثا غير ثلث غير ثنتين قال محمد رح 1533
يقع ثنتان - و لو قال انت طالق عشرا الا تسعا الا واحدة يقع ثنتان - و
الاصل في تخريج هذه المسائل ان يأخذ العدد الاول بيمينه ثم الثاني
بيساره ثم الثالث بيمينه ثم يطرح ما في يساره عما في يمينه فما
بقي في يمينه بعد الطرح فهو الواقع *

١٥٣٤ و لو قال انت طالق ثلثا الا واحدة او نصف واحدة يقع الثلث - لانه 1534
ارتفع الشك في المستثنى فكان المستثنى هو الاقل كانه قال انت طالق
ثلثا الا نصف واحدة *

١٥٣٥ و كذا لو قال انت طالق ثلثا الا واحدة او لا شيء يقع الثلث - لانه 1535
لم يستثن *

١٥٣٦ اذا[٤] قال لامراته انت طالق ثنتين و ثنتين و تنتين الا اربع طلقت 1536
ثنتين - ولو قال انت طالق انت طالق انت طالق الا واحدة يقع الثلث
و كذا لو قال انت طالق ثلثا الا واحدة و واحدة و واحدة طلقت ثلثا *

١٥٣٧ رجل[٥] قال لامرأته انت بائن و ينوي بذلك ثلثا الا واحدة طلقت 1537

(٢ ن) لا اجيئنك * (٣ ن) و لو قال لامـــرأته * (٤ ن) فاذا قال *
(٥ ن) و لو قال *

١٥٢٤ رجل حلف بالطلاق و اراد ان يقول في آخره ان شاءالله فاخذ انسان 1524
فمه فان ذكر الاستثناء بعد ما رفع يده عن فمه موصولا يصح الاستثناء - كما
لو تخلل بين الطلاق و بين الاستثناء عطاس او جشاء *

١٥٢٥ رجل اراد ان يحلف رجلا فخاف ان يستثني الحالف فالحيلة له 1525
ان يأمر الحالف حتى يقول عقيب اليمين موصولا سبحان الله او استغفر
الله او كلاما لا يصح الاستثناء بعده *

١٥٢٦ رجل قال و الله لا اكلم فلانا استغفر الله ان شاء الله قالوا في اليمين 1526
بالطلاق يكون مستثنيا ديانة *

١٥٢٧ رجل قال لامرأته انت طالق ثلثا اولا و فارسيته يا نه لا يقع شيئ - و 1527
كذا لو قال انت طالق و الا و فارسيته و مكر *

١٥٢٨ و كذا لو قال انت طالق ثلثا ان كان و فارسيته اگر بود - و كذا لو قال 1528
انت طالق ثلثا ان و فارسيته اگر - و كذا لو قال انت طالق ثلثا ان لم و
فارسيته اگر نه - و كذا لو قال انت طالق ثلثا ان لم يكن و فارسيته اگر
نبود - لان هذه الالفاظ الفاظ الشرط و الشرط اذا اتصل بالجزاء يخرجه
من ان يكون ايقاعا *

١٥٢٩ رجل حلف بطلاق امرأته ان لا يكلم فلانا الا ناسيا فكلمه ناسيا ثم كلمه ذاكرا 1529
كان حانثا - لانه استثنى الكلام ناسيا من مطلق الكلام فيبقى(٢) ما وراءه داخلا *

١٥٣٠ و لو قال لامرأته انت طالق ان كلمت فلانا الا ان انسى(٣) و كلمه ناسيا 1530
ثم كلمه ذاكرا لا يكون حانثا - لان كلمة الا ان للغاية - قال الله تعالى و
لستم بآخذيه الا تغمضوا فيه و اراد به الغايه - فاذا كلمه ناسيا انتهت
اليمين فلا يحنث بعد ذلك *

(٢ ن) فبقي ما وراءه * (٣ ن) فكلمه *

في الرصايا انه اذا وقع الشك في الاستثناء يقل الاستثناء في قول ابي يوسف رح - لان على قوله الاستثناء اخراج فاذا وقع الشك في الاستثناء لايخرج الا القدر المتيقن - و على قول محمد رح الاستثناء تكلم بالباقي بعد الثنيا فالشك في الاستثناء يكون شكا في الايجاب فلا يثبت الا القدر المتيقن - و ذكر في الاقرار اذا قال الرجل لغيره لك علي الف الا مائة او خمسون ذكر في نوادر ابي سليمان رح انه يلزمه تسعمائة و خمسون - و ذكر في رواية ابي حفص رح انه يلزمه تسع مائة و هو الصحيح *

١٥١٨ رجل قال لامرأته انت طالق ثلثا الا شيئا طلقت ثنتين قضاء * 1518

١٥١٩ اذا قال لامرأته انت طالق ثلثا الا واحدة غدا او قال الا واحدة ان 1519
كلمت فلانا لايقع شيء قبل مجيء الغد و الكلام - و عند الكلام و مجيء الغد يقع ثنتان - لان الاصل ان يكون المستثنى منه من جنس المستثنى فاذا كان المستثنى معلقا او مضافا الى الغد كان المستثنى منه معلقا او مضافا الى الغد *

١٥٢٠ اذا قال لامرأته انت طالق يا زانية ثلثا قال ابو حنيفة رحمه الله تعالى 1520
تطلق ثلثا - و لا حد عليه و لا لعان - و قال ابو يوسف رح هي طالق واحدة و عليه الحد - لان حكم القذف اشد من حكم الطلاق فيصير فاصلا بين الثلث و الطلاق فيقع واحدة *

١٥٢١ و لو قال لغير المدخول بها انت طالق طالق ثلثا لا يقع الا واحدة * 1521

١٥٢٢ رجل قال لامرأته انت طالق ثلثا فاعلمي ان شاء الله صح الاستثناء * 1522

١٥٢٣ و لو قال انت طالق ثلثا اعلمي ان شاء الله او قال اذهبي 1523
ان شاء الله طلقت ثلثا - و بطل الاستثناء *

١٥١٠ اذا قال لامرأته انت طالق اربعا الا ثلثا يقع واحدة * 1510

١٥١١ و كذا لو قال انت طالق عشرا الا تسعا كانت(٢) تطليقة واحدة * 1511

١٥١٢ و لو قال انت طالق ثلثا و ثلثا الا اربعا قال ابوحنيفة رحمه الله تعالى 1512
يقع الثلث - لان الثلث الثاني وقع لغوا فصار فاصلا بين الاستثناء و بين
الاول - و قال محمد رح يقع ثنتان - لانه جمع بين الثلث الاول و الثاني
بحرف الجمع فصار كانه قال انت طالق ستا الا اربعا فيقع ثنتان *

١٥١٣ و لو قال انت طالق ثلثا الا واحدة و اثنتين عن ابي حنيفة رحمه 1513
الله تعالى انه قال يقع الثلث كانه قال انت طالق ثلثا الا ثلثا - و قال
ابو يوسف رح يقع ثنتان فيصح استثناء الواحدة و يبطل الباقي *

١٥١٤ و لو قال انت طالق واحدة و واحدة و واحدة الا ثلثا طلقت ثلثا كانه 1514
قال انت طالق ثلثا الا ثلثا *

١٥١٥ و كذا لو قال انت طالق واحدة و واحدة و واحدة الا واحدة و واحدة 1515
و واحدة طلقت ثلثا *

١٥١٦ و لو قال انت طالق ثلثا الا واحدة و واحدة و واحدة طلقت ثلثا 1516
لانه جمع في الاستثناء بحرف الجمع فصار كانه قال انت طالق ثلثا الا
ثلثا - و قال ابو يوسف رح يقع واحدة و يصح استثناء الواحدة و الثانية
لانه استثناء(٣) البعض - و لا يصح اشتثناء الباقي كيلا يؤدي الى استثناء الكل *

١٥١٧ و لو قال انت طالق ثلثا الا واحدة او اثنتين و مات قبل البيان 1517
ذكر في بعض الروايات عن ابي يوسف رح انه يقع واحدة - و يقع
ثنتان في قول محمد رح - و على قول ابي يوسف رح يكثر الاستثناء
و يقل الواقع - و على قول محمد رح يقل الاستثناء فيقع ثنتان - و ذكر

(٢ ن) كانت طالقا واحدة * (٣ ن) استثنى البعض *

و قال الزوج قلت قول النصاري الا انهم لم يسمعوا فان القاضي يجيز شهادتهم - و يفرق بينه و بين المرأة - و ان قال الشهود لا ندري قال ذلك ام لا الا انا لم نسمع منه شيئا غير قوله المسيح ابن الله لا يقبل القاضي شهادتهم حتى يشهدوا انه لم يقل معها غيرها - و جعلوا دعوى الاستثناء في الطلاق كذلك - قال شمس الائمة السرخسي رح هذه من المسائل التي يقبل فيها الشهادة على النفي - و لو جري الاستثناء على لسانه من غير قصده او استثنى و لا يعرف معني الاستثناء قد مرقبل هذا *

1505 ١٥٠٥ رجل قال لامرأته انت طالق و طالق و طالق ان شاء الله يصح الاستثناء و لا يقع شيئ *

1506 ١٥٠٦ و لو قال انت طالق و طالق و طالق ان شاءالله قالوا في قياس قول ابي حنيفة رحمه الله تعالى يقع الثلث - لانه تخلل بين الثلث و بين الاستثناء ما لا حكم له فيلغو فلا يصح الاستثناء - كمالو سكت بعد الثلث قبل الاستثناء - و على قول ابي يوسف و محمد رحمهما الله تعالى لا يقع شيئ *

1507 ١٥٠٧ قال رضي الله تعالى عنه و لو قال لامرأته انت طالق ثنتين و ثنتين الا واحدة طلقت ثلثا *

1508 ١٥٠٨ و لو قال انت طالق ثنتين و ثنتين الا ثنتين يقع ثنتان *

1509 ١٥٠٩ و لو قال انت طالق ثنتين و ثنتين الا ثلثا طلقت ثلثا - لانه لا وجه لان يجعل هذا استثناء الثلث من الثنتين لا من الثنتين الاولين و لا من الاخريين و لا وجه ان يجعل هذا استثناء الثلث منهما جميعا فيكون مستثنى من كل ثنتين واحدة (٢) و نصفها فيبطل الاستثناء ضرورة *

(٢ ب) واحدة و نصفا *

واحدة و ثلثا ان شاء الله صح الاستثناء في قولهم *

1502 ١٥٠٢ رجل طلق امرأته ثلثا فشهد عنده عدلان انك استثنيت موصولا و هو لا يذكر ذلك قالوا ان كان الرجل في الغضب يصير بحال يجري على لسانه ما لا يريد و لا يحفظ ما يجزي جاز له ان يعتمد على قولهما - و الا فلا *

1503 ١٥٠٣ اذا ادعت المرأة الطلاق فقال الزوج كذبت قلت لها انت طالق ان شاء الله فكذبته المرأة في الاستثناء ذكر في الروايات الظاهرة ان القول قول الزوج - و عند بعض المتاخرين لا يقبل قوله الا ببينة - و لو قال الزوج طلقتك امس و قلت ان شاء الله في ظاهر الرواية يكون القول قول الزوج - و ذكر في النوادر خلافا بين ابي يوسف و محمد رح - فقال على قول ابي يوسف رح يقبل قول الزوج و لا يقع الطلاق - و على قول محمد رح يقع الطلاق و لا يقبل قوله - و عليه الاعتماد و الفتوى احتياطا لامر الفرج في زمان غلب (٢) فساد الناس *

1504 ١٥٠٤ و لو خالع امرأته ثم ادعى الاستثناء في الخلع في ظاهر الرواية هذا و الطلاق سواء - و ان ذكر البدل في الخلع فقال خالعتك على كذا فقبلت ثم ادعى الاستثناء ذكر عصام و غيره انه لا يصدق قضاء اذا اخذ على الخلع جعلا و اراد باخذ الجعل ذكر البدل في الخلع لا حقيقة الاخذ - و كما لا يصدقه القاضي فيما ذكرنا لا تصدقه المرأة - و ان شهد الشهود بخلع او بطلاق بغير استثناء قال في السير الكبير اذا اختلف الزوجان فقال الرجل قلت المسيح ابن الله في قول النصارى و قالت المرأة لم تقل قول النصارى كان القول قول الزوج مع يمينه - فان جاءت المرأة بشهود فقالوا سمعنا يقول المسيح ابن الله و لم يقل شيئا آخر

(٢ ب) غلب على الناس الفساد *

ينصرفت الاستثناء اليهما و لا يقع شيء *

1497 ١٤٩٧ و لو قال انت طالق ثلثا ان شاء الله انت طالق طلقت للحال واحدة *

1498 ١٤٩٨ و لو قال انت طالق واحدة ان شاء الله و انت طالق ثنتين ان لم يشأ الله قالوا لا يقع شيء - و هذا الجواب على قول محمد رح ظاهر لان عنده الاستثناء ابطال تقدم او تأخر - و قوله ان شاء الله و قوله ان لم يشأ الله كل واحد منهما استثناء فيبطل الكل - و على قول ابي يوسف رح الاستثناء تعليق فالطلاق الاول تعلق بمشيئة الله و الثاني تعلق بعدم مشيئة الله و مشيئة الله غيب عنا لا نعرف وجودها ما لم تظهر فلا يحكم بوقوع الطلاق - و لان بالكلام الثاني يتعلق الطلاق بعدم المشيئة فلو قلنا بوقوع الطلاق تظهر مشيئة الله تعالى فيبطل من حيث يصح فلا يصح *

1499 ١٤٩٩ و لو قال لامرأته انت طالق اليوم واحدة ان شاء الله و ان لم يشأ فثنتين فمضى اليوم و لم تطلق قال ابو يوسف رح يقع ثنتان - لان الله تعالى لو شاء وقوع الواحدة لجرى على لسانه الطلاق في اليوم فاذا مضى اليوم و لم تطلق انعدمت المشيئة - و ان طلقها في اليوم واحدة لا ينزل اكثر من ذلك *

1500 ١٥٠٠ و لو قال انت طالق ثلثا و ثلثا ان شاء الله على قول ابي حنيفة رحمه الله تعالى تطلق ثلثا *

1501 ١٥٠١ و كذا لو قال لعبده انت حر و حر ان شاء الله يعتق العبد عند ابي حنيفة رحمه الله تعالى - لان الايجاب الثاني وقع لغوا فيصير فاصلا بين الاستثناء و بين ما قبله - و قال صاحباه الاستثناء صحيح و لا يقع الطلاق و العتاق - و على هذا الخلاف لو قال انت طالق ثلثا و واحدة ان شاء الله عند ابي حنيفة رحمه الله تعالى يقع الثلث - و لو قال انت طالق

و على قول ابي يوسف رح ينصرف الاستثناء الى اليمين الثانية كما لو ذكر مكان الاستثناء شرطا *

1493 ١٤٩٣ و لو قال انت طالق بارادة الله تعالى او بمحبته او بمشيته او برضاه لا تطلق - و كذا لو ذكر مكان حرف الباء كلمة في فقال انت[٢] طالق في مشيئة الله او في ارادته او في حكم الله او في امره او في قضائه او في قدرته او في تقديره لا تطلق *

1494 ١٤٩٤ و لو قال انت طالق في علم الله او في معلومه تطلق و لو ذكر حرف اللام فقال انت طالق لمشية الله او لمحبته او لقضائه او غيرها من الالفاظ[٣] تطلق - و لو قال انت طالق بعون الله او بحكم الله او بقضائه او بعلمه او بقدرته تطلق *

1495 ١٤٩٥ و من شرط صحة الاستثناء عند مشائخنا رح ان[٤] يكون الاستثناء مسموعا بحيث لو قرب انسان اذنه الى فيه يسمع - و يصح استثناء الاصم - و من شرط صحة الاستثناء ايضا ان يكون موصولا و لا ينقطع بالتنفس و لا بالعطاس و الجشاء و لا يتخلل النداء بين الاستثناء و بين ما قبله حتى لو قال انت طالق يا عمرة انشاء الله صح الاستثناء - و كذا لو قال انت طالق يا زانية انشاء الله يصح الاستثناء - و كذا لو قال انت طالق ثلثا يا فلانة الا واحدة يصح استثناء الواحدة و يقع ثنتان - و لو قال انت طالق حتى يطيب قلبك ان شاء الله يكون فاصلا فيقع الطلاق و لا يصح الاستثناء *

1496 ١٤٩٦ رجل قال لامرأته انت طالق ان شاء الله انت طالق عندنا ينصرف الاستثناء الى الاول - و يقع واحدة بالكلام الثاني - و على قول زفر رح

(٢ ن) انت طالق في ارادة الله او في حكم الله او في امر الله او في قضائه *

(٣ ن) الفاظ * (٤ ن) ان يكون مسموعا *

تكلمت باحدهما يخرج الامر من يدها - اما كلمة متى للوقت فلا يخرج الامر من يدها اذا تكلمت باحدهما - الا يرى انه لو قال لها انت طالق متى شئت فقالت في مجلس او بعده لا اشاء لا يخرج الامر من يدها و لها ان تشاء بعد ذلك - و كذا لو قال متى ابيت *

1488 ١٤٨٨ و لو علق الطلاق بمشيئة الله تعالى فقالت انت طالق ان شاء الله تعالى او قال ان احب او رضي او اراد او قدر لا يقع الطلاق - و كذا لو قال انت طالق ما شاء الله او قال الا ان يشاء الله او قال ان لم يشأ الله *

1489 ١٤٨٩ و لو قال انت طالق كيف شاء الله يقع الطلاق واحدة رجعية - و كذا لو قال انت طالق و ان شاء الله *

1490 ١٤٩٠ و لو قال ان شاء الله فانت طالق لا تطلق في قولهم *

1491 ١٤٩١ و لو قال ان شاء الله انت طالق لا تطلق في قول ابي يوسف رح و تطلق في قول محمد رحمه الله - و الفتوى على قول ابي يوسف رح و كذا لو قال ان شاء الله و انت طالق *

1492 ١٤٩٢ و اختلف(٢) ابو يوسف و محمد رح ان الطلاق المقرون بالاستثناء في موضع يصح الاستثناء هل يكون يمينا - قال ابو يوسف رح يكون يمينا - حتى لو قال لامرأته ان حلفت بطلاقك فعبدي حر ثم قال لها انت طالق ان شاء الله حتى يصح الاستثناء عندهما يحنث في قول ابي يوسف رح - و قال محمد رح لا يكون يمينا و لا يحنث - و على هذا لو قال لامرأته انت طالق ان دخلت الدار و عبدي حر ان كلمت فلانا ان شاء الله على قول محمد ينصرف الاستثناء الى الطلاق و العتاق جميعا

(٢ ن) ثم اختلف ابو يوسف و محمد رحمهما الله تعالى ان هذا اللفظ و هو الطلاق المقرون الا *

شئت و ان لم تشائي فقالت في مجلسها شئت طلقت (٢) لوجود المشيئة - و كذا لو قامت عن مجلسها (٣) قبل ان تقول شيئا طلقت - لان عند تقديم الطلاق يتعلق الطلاق باحدهما - كما لو قال انت طالق ان اكلت و ان شربت فاذا قالت شئت طلقت لوجود المشيئة - و كذا لو قامت عن مجلسها قبل ان تقول شيئا طلقت لعدم المشيئة - و ان وسط الطلاق فقال ان شئت فانت طالق و ان لم تشائي فهو بمنزلة ما لو قدم الطلاق على الشرطين لما عرف في الجامع الكبير - و ان ذكر الاباء و قدم الطلاق فقال انت طالق ان شئت و ان ابيت فقالت شئت او قالت ابيت يقع الطلاق - لان الشرط احدهما - و ان قامت عن مجلسها قبل ان تقول شيئا لا يقع - لان الشرط احدهما و لم يوجد - و اما المشيئة فظاهرة للعرف و كذا الاباء - لان الاباء فعل و الفعل يعرف بعدم ضده بخلاف عدم المشيئة و كل ذلك يكون بلسانه لا بقلبه - و الكراهة بمنزلة الاباء - و ان وسط الطلاق فقال ان شئت فانت طالق و ان ابيت فهو بمنزلة ما لو قدم الطلاق - قال محمد رح هذا اذا لم ينو شيئا - فان نوى وقوع الطلاق دون التعليق يقع الطلاق في الوجوه كلها قدم الطلاق على الشرط او آخر او وسط - لانه اذا نوى الايقاع يصير كانه قال انت طالق شئت او لم تشائي او قال انت طالق شئت او ابيت - و لو قال لها انت طالق متى شئت و ابيت فهو على المجلس و غيره - و لا تطلق حتى تقول شئت و ابيت بخلاف قوله انت طالق ان شئت و ابيت - لان ذلك يقتصر على المجلس فاذا

(٢ ن) طلقت لانه عند تقديم الطلاق يتعلق الطلاق باحدهما كما لو قال انت طالق ان اكلت و ان شربت فاذا قالت شئت طلقت لوجود المشيئة * (٣ ن) قبل ان تقول شيئا طلقت لعدم المشيئة و ان وسط الطلاق الا *

١٤٨٥ رجل قال لامرأته انت طالق ان شئت واحدة و ان شئت ثنتين 1485
فقالت قد شئت ثلثا طلقت ثلثا *

١٤٨٦ و لو قال انت طالق ثلثا و ثلثة واحدة ان شئت فشاءت واحدة لثلثة 1486
طلقت ثلثة واحدة و يبطل عنها الثلث *

١٤٨٧ رجل قال لامرأته ان شئت و ان لم تشائي فانت طالق - فهذه 1487
المسئلة على وجوه - منها - ان (٢) يقدم المشيئة فقال ان شئت - و ان تشائي
فانت طالق او قدم الطلاق فقال انت طالق ان شئت و ان لم تشائي - او
وسط الطلاق فقال ان سئت فانت طالق و ان لم تشائي - و كل ذلك على
وجهين - احدهما اذا اعاد كلمة الشرط فقال ان شئت و ان لم تشائي فانت
طالق او لم يعد و ذكر حرف العطف فقال ان شئت ولم تشائي فانت
طالق - و الالفاظ ثلثة المشيئة و الاباء والكراهة - فان لم يعد كلمة الشرط و
عطف لايقع الطلاق في الوجوه الثلثة قدم الطلاق على المشيئة او اخر او وسطه
لان عند حرف العطف يتعلق الطلاق بالمشيئة و عدم المشيئة كما لو قال
ان اكلت و شربت فانت طالق فان الطلاق يتعلق بهما جميعا و الجمع
بين المشيئة و عدم المشيئة لا يتصور فلا يقع الطلاق ابدا - و ان (٣) اعاد كلمة
الشرط و قدم المشيئة فقال ان شئت و ان لم تشائي فانت طالق لايقع
الطلاق ابدا - لان عند تقديم الشرط يتعلق الطلاق بالمشيئة و عدم المشيئة
جميعا كما لو قال ان اكلت و ان شربت فانت طالق يتعلق بهما
فلا يقع اليمين - و كذا لو قال ان شئت و ان ابيت فانت طالق او ذكر
الكراهة مكان الاباء - و ان قدم الطلاق على المشيئة فقال انت طالق ان

(٢ ن) انه قدم المشيئة * (٣ ن) و ان اعاد كلمة الشرط ان
قدم المشيئة *

واحدة رجعية لا يقع شيئ في قول ابي يوسف رح و هو قياس قول ابي حنيفة رحمه الله تعالى *

١٤٧٨ و لو قال لها طلقي نفسك واحدة املك الرجعة ان شئت فطلقت 1478
نفسها واحدة بائنة يقع واحدة رجعية في قول ابي يوسف رح - لان في مشيئة البائنة مشيئة اصل الطلاق - و لا يقع شيئ في قياس قول ابي حنيفة رحمه الله تعالى - لانها ما اتت بمشيئة فوض اليها فلا يقع كما لو قال لها طلقي نفسك واحدة فطلقت نفسها ثلثا لا يقع شيئ في قول ابي حنيفة رحمه الله تعالى *

١٤٧٩ رجل قال لغيره طلق امرأتي ما شاء (٢) الله تعالى و شئت فطلقها المخاطب 1479
لا يقع - و كذا لو قال لامرأته انت طالق ان شاء الله و شئت لايقع شيئ *

١٤٨٠ رجل قال لامرأته انت طالق ان شئت و شئت و شئت فقالت 1480
شئت لايقع شيئ حتى تقول ثلث مرات شئت *

١٤٨١ و لو قال لامرأته انت طالق متى شئت فقالت في المجلس او 1481
بعده لا اشاء لا يخرج الامر من يدها - و كذا لو قال انت طالق متى ابيت فقالت لا آبي *

١٤٨٢ و لو قال لها طلقي نفسك ثلثا ان شئت فقالت انا طالق لايقع شيئ * 1482

١٤٨٣ و لو قال لها طلقي نفسك ان شئت فقالت قد شئت ان اطلق 1483
نفسي كان باطلا *

١٤٨٤ رجل قال لامرأته طلقي نفسك اذا شئت ثم جن الرجل جنونا مطبقا ثم 1484
طلقت المرأة نفسها قال محمد رح كل شيئ يملك الزوج ان يرجع عن كلامه يبطل بالجنون - و كل شيئ لم يكن له ان يرجع عن كلامه لا يبطل بالجنون *

(٢ ن) ان شاء الله تعالى و شئت فطلقها المخاطب لا تطلق *

١٤٧١ رجل قال لامرأته طلقي نفسك عشرا ان شئت فقالت طلقت نفسي 1471
ثلثا لا يقع شيء - و لو قال طلقي نفسك واحدة ان شئت فقالت قد
شئت ثلثا لا يقع شيء في قول ابي حنيفة رحمه الله تعالى - و قال
ابو يوسف رح يقع واحدة *

١٤٧٢ و لو قال لها طلقي نفسك ان شئت وطلقي فلانة امرأة له اخرى 1472
ان شئت فقالت فلانة طالق و انا طالق او قالت انا طالق و فلانة طالق
طلقتا جميعا قال محمد رحمه الله تعالى *

١٤٧٣ و كذا لو قال لامرأته انت طالق واحدة ان شئت و انت طالق ثنتين 1473
ان شئت فقالت قد شئت واحدة قد شئت ثنتين اذا وصلت فهي
طالق ثلثا *

١٤٧٤ و كذا لو قال طلقي نفسك ان شئت و اعتقي عبدي ان شئت 1474
فبدأت بطلاق نفسها او اعتاق عبده صح - قال اذا كان الطلاق و العتاق
من قبل الزوج فهما امر واحد لا يخرج الامر من يدها بايهما بدأت
و لو قال لها زوجها طلقي نفسك ان شئت و قال لها رجل آخر اعتقي
عبدي ان شئت فبدأت باعتاق العبد قبل الطلاق خرج الامر من
يدها - قال من قبل انها اخذت في عمل غير الطلاق *

١٤٧٥ رجل قال لامرأته انت طالق ان لم يشأ فلان طلاقك اليوم فقال فلان 1475
لا اشاء لا تطلق - لان له ان يشاء في اليوم *

١٤٧٦ قال (٢) لامرأته انت طالق واحدة ان شئت فقالت شئت نصف 1476
واحدة لا تطلق *

١٤٧٧ قال لامرأته طلقي نفسك واحدة بائنة ان شئت فطلقت نفسها 1477

(٢ س) و لو قال لامرأته *

١٤٦٣ و لو قال نسائي كلهن طوالق ان دخلت الدار فدخلت طلقت هي 1468
و غيرها *

١٤٦٤ و لو قال آية نسائي شئت طلاقها فهي طالق فشاءت طلق الكل 1464
لا تطلق الا واحدة - و لو قال آية نسائي شاءت الطلاق فهي طالق
فشئن طلقن *

١٤٦٥ رجل قال لامرأته انت طالق غدا ان شئت كانت المشيئة اليها في 1465
الغد - و لو قال ان شئت فانت طالق غدا كانت المشيئة للحال في قول
محمد رح - و قال ابو يوسف رح المشيئة اليها في الغد في الفصلين
و هو رواية عن ابي حنيفة رحمه الله تعالى - و قال زفر رح المشيئة اليها
في الحال في الفصلين - و كذا قال ابو حنيفة رحمه الله تعالى *

١٤٦٦ اذا قال الرجل لامرأته اختاري غدا ان شئت او امرك بيدك غدا 1466
ان شئت او قال ان شئت فاختاري غدا او قال ان شئت فامرك
بيدك في الغد كانت المشيئة في الغد *

١٤٦٧ وكذا لو قال ان شئت فطلقي نفسك غدا لم يكن لها ان تطلق نفسها 1467
حتى يجيء الغد *

١٤٦٨ و كذا لو قال انت طالق اذا دخلت الدار ان شئت قال ابو يوسف 1468
رح و هو قول ابي حنيفة رحمه الله تعالى المشيئة بعد الدخول *

١٤٦٩ و لو قال انت طالق رأس الشهر ان شئت كانت المشيئة لها 1469
رأس الشهر *

١٤٧٠ رجل قال لامرأته انت طالق ثلثا ان شئت فقالت انا طالق فهو باطل 1470
و ان (٢) قالت انا طالق ثلثا فهي ثلث *

(٢ س) و لو قالت *

طلقتك تطلق اخرى في القضاء - فان عني طلاقا بذلك القول دين فيما بينه و بين الله تعالى *

1457 ١٤٥٧ رجل قال لاجنبية ان طلقتك فعبدي حر يصح ذلك و يصير كانه قال ان تزوجتك و طلقتك فعبدي حر - و لو قال ان طلقتك فانت طالق ثلثا لا يصح هذه اليمين *

1458 ١٤٥٨ اذا قال للمنكوحة نكاحها فاسدا ان طلقتك فاليمين على الطلاق باللسان *

1459 ١٤٥٩ رجل حلف ليطلقن فلانة اليوم ثلثا وفلانة اجنبية او امرأة طلقها هو ثلثا فيمينه على ان يطلقها باللسان - و هو كما لو حلف ليتزوجن فلانة اليوم و هي منكوحة الغير و مدخولته كانت اليمين على النكاح الفاسد *

1460 ١٤٦٠ رجل قال لامرأته ان دخلت الدار ان دخلت الدار فانت طالق قبل ذلك في دار واحدة فدخلت الدار مرة واحدة طلقت استحسانا - و كذا لو قال ان تزوجتك ان تزوجتك فانت طالق فتزوجها مرة واحدة طلقت - و ان (٢) قال ان تزوجتك فانت طالق ان تزوجتك او قال اذا دخلت الدار فانت طالق اذا دخلت هذه الدار لا تطلق ما لم تدخل مرتين و لا تطلق ما لم يتزوجها مرتين *

1461 ١٤٦١ رجل قال لامرأته طلقي اية نسائي شئت ليس لها ان تطلق نفسها في ظاهر الرواية - و عن ابي يوسف رح لها ان تطلق نفسها - و كذا لو قال نسائي كلهن طوالق ان شئت فقالت شئت يقع الطلاق عليها و على غيرها في قول ابي يوسف رح *

1462 ١٤٦٢ و لو قال لها امر نسائي بيدك قالوا ليس لها ان تطلق نفسها - و عن ابي يوسف رح لها ان تطلق نفسها *

(٢ ن) و لو قال *

تزوج امرأة وقعت على كل واحدة منهما تطليقة فبانت الحديثة لا الى عدة فكيف يملك صرف الطلاق الثاني اليها *

1450 ١٤٥٠ رجل له اربع نسوة قال كل امرأة لي طالق اذا دخلت هذه الدار ثم طلق واحدة بعينها تطليقة بائنة ثم دخل الدار و هي في العدة طلقن جميعا *

1451 ١٤٥١ رجل قال كل امرأة لي طالق و ينوي بذلك من كانت في نكاحه و من يستفيدها بعد ذلك لا يقع على من يستفيدها *

1452 ١٤٥٢ رجل قال كل امرأة اتزوجها فهي طالق ان كلمت فلانا فكلم ثم تزوج لا يقع الطلاق عليها - و لو كلم ثم تزوج ثم كلم طلقت المتزوجة بعد الكلام الاول ذكرها القدوري رح *

1453 ١٤٥٣ و لو قال كل امرأة اتزوجها فهي طالق ان كلمت فلانا فتزوج ثم كلم ثم تزوج اخرى ثم كلم لا تطلق الثانية *

1454 ١٤٥٤ و لو قال كل امرأة اتزوجها فهي طالق كلما كلمت فلانا فتزوج امرأة فكلم طلقت - فان تزوج امرأة اخرى ثم كلم ثانيا طلقت المنكوحة الاولى تطليقـــة اخرى بهذا الكلام ان كانت في العدة - و لا تطلق المنكوحة الثانية *

1455 ١٤٥٥ رجل قال لامرأته ان لم تكوني حاملا فانت طالق ثلثا فجاءت بولد لاقل من سنتين بيوم من وقت اليمين لا تطلق في الحكم - فان جاءت لاكثر من سنتين بيوم طلقت - و ان حاضت بعد اليمين لا يقربها لاحتمال ان لا تكون حاملا - وكذا اذا (٢) لم تحض لاينبغي له ان يقربها حتى تضع *

1456 ١٤٥٦ رجل قال لامرأته ان قلت لك انت طالق فانت طالق فقال قد

(٢ ن) وكذا لو لم تحض *

١٤٤٤ ولو قال كل امرأة لي طالق و انت طالق لزمها ثنتان - و لسائر النساء 1444
واحدة واحدة *

١٤٤٥ و لو قال انت و من دخلت الدار من نسائي طوالق فهي طالق 1445
حين سكت - و ان دخلت الدار و هي في العدة لزمتها اخرى *

١٤٤٦ و لو قال لعبده انت حر ومن دخل الدار من عبيدي عتق المخاطب 1446
للحال - فان قال عنيت تعلق[٢] عتقه بالدخول لا يصدق قضاء *

١٤٤٧ رجل قال لامرأته كل امرأة اتزوجها ما دمت حية فهي طالق 1447
لا تدخل المخاطبة في اليمين - و كذا لو قال كل امرأة اتزوجها ما دامت
فلانة حية لا تدخل فلانة في اليمين *

١٤٤٨ و لو قال كل امرأة اتزوجها باسمك فهي طالق فطلق هذه ثم تزوجها 1448
لا تطلق و ان كان نواها عند اليمين - كما لو قال كل امرأة اتزوجها غيرك
فهي طالق لا تدخل هي في اليمين و ان نواها *

١٤٤٩ رجل قال لامرأته ان تزوجت عليك ما عشت فحلال الله علي حرام 1449
ثم قال ان تزوجت عليك فالطلاق علي واجب فتزوج عليها يقع على
كل واحدة طلقة[٣] و يقع تطليقة اخرى يصرفها الى ايتهما شاء - لان قوله
فحلال الله علي حرام جعل يمينا بطلاق كل من كانت في نكاحه و كلام
الثاني يمين بطلاق واحدة من نسائه بغير عينها فاذا تزوج امرأة انحلت
اليمينان فيقع على كل واحدة منهما تطليقة باليمين الاولى - و بالكلام
الثاني على قول من يصحح هذه اليمين يقع طلاق آخر على واحدة
بغير عينها يصرفه الى ايتهما شاء - قال مولانا رضي الله تعالى عنه و في
هذا الجواب نظر - لان الكلام الثاني يمين بطلاق واحدة بغير عينها و كما

(٢ ن) تعليق عتقه * (٣ ن) تطليقة *

بدخول الدار - لانه جعل طلاق الغد جزاء الدخول *

1436 و لو قال لامرأته ان دخلت الدار فانت طالق و طالق و طالق ان كلمت فلانا فالطلاق الاول و الثاني يتعلق بالدخول - و الطلاق الثالث يتعلق بالشرط الثاني - لو دخلت الدار تطلق ثنتين - و لو كلمت فلانا طلقت واحدة *

1437 و لو قال ان دخلت الدار فانت طالق ان كلمت فلانا كان الطلاق المعلق بالكلام جزاء للدخول حتى لو كلمت قبل الدخول في الدار ثم دخلت الدار لا يقع شيء *

1438 رجل قال لامرأته انت و من دخلت الدار من نسائي طالق طلقت المخاطبة للحال[٢] - فان دخلت الدار و هي في العدة طلقت اخرى لان الدخول في الخطاب الخاص لا يمنع الدخول في الخطاب العام *

1439 و كذا لو قال كل امرأة من نسائي تدخل الدار فهي طالق و فلانة طلقت فلانة للحال - فان دخلت الدار و هي في العدة طلقت اخرى *

1440 وكذا لو قال كل امرأة اتزوجها فهي طالق و فلانة لامرأة له اخرى طلقت فلانة للحال - و لا ينتظر التزوج - فان تزوجها بعد ذلك طلقت اخرى *

1441 و لو قال لامرأته انت طالق و فلانة ان تزوجتها[٣] لا تطلق امرأته حتى يتزوج فلانة *

1442 و لو قال انت و فلانة طوالق ان تزوجتها لم يقع الطلاق على واحدة حتى يتزوج فلانة *

1443 و لو قال انت و فلانة طوالق ان دخلت فلانة الدار لا يقع الطلاق حتى تدخل فلانة *

(٢ ن) في الحال * (٣ ن) ان تزوجتها *

لا تطلق امرأته و ان كان يصلح للايقاع على امرأته - لانه اذا كان موقوفا كان محمولا على الحكاية *

1433 ١٤٣٣ رجل له اربع نسوة دخل بهن فقال كل امرأة لم اجامعها منكن الليلة فالاخريات طوالق فجامع واحدة فطلع الفجر طلقت التي جامعها ثلثا لانه جعل ترك جماع الواحدة شرطا لوقوع الطلاق على البواقي بكلمة توجب تعميم النساء - و في التي جامعها وجد شرط طلاقها ثلث مرأتة و هو ترك جماع الثلث فتطلق هي ثلثا - اما في غيرها وجد في حق كل واحدة شرط الطلاق مرتين بترك جماع غيرها فتطلق مرتين *

1434 ١٤٣٤ رجل قيل له الك امرأة غير هذه فقال كل امرأة لي فهي طالق لا تطلق امرأته - و هذا بخلاف ما اذا قالت المرأة لزوجها انك تريد ان تتزوج علي فقال ان تزوجت امرأة فهي طالق فاباتها ثم تزوجها تطلق مرة اخرى - و كذا لو قالت له امرأته انك تزوجت علي امرأة فقال كل امرأة لي طالق تطلق المخاطبة الا في رواية عن ابي يوسف رح - و الفرق ان كلام الزوج في هاتين المسئلتين بناء على كلام المرأة فتدخل في كلامه ما دخل في كلام المرأة و المذكور في كلام المرأة في المسئلتين امرأة و هذا الاسم يتناول اية امرأة كانت فتدخل المخاطبة في كلام الزوج - اما في المسئلة الاولى قول القائل انك امرأة غير هذه لا يتناول هذه المرأة بحال ما لم يتناولها جواب الزوج *

1435 ١٤٣٥ رجل قال لامرأته انت طالق غدا اذا دخلت الدار يلغو ذكر الغد و يتعلق الطلاق بدخول الدار - حتى لو دخلت في اي وقت كان تطلق - ولو قدم الشرط فقال ان دخلت الدار فانت طالق غدا يتعلق (٢) الطلاق في الغد

(٢ س) يتعلق طلاق الغد بالدخول *

الذي تكلمت اكثر من واحدة فان ابى ان يحلف لم ترجع اليه - و ان حلف رجعت اليه بنكاح جديد *

1429 ١٤٢٩ امرأة كانت مع زوجها في بيت قريب لها فقال لها في الليل ان بت الليل في هذا البيت فحلال الله علي حرام فخرجت من ساعتها و باتت في موضع اتاها زوجها قالوا ان اراد الزوج تحويلها بنفسها لا يحنث - و القول في ذلك قوله *

1430 ١٤٣٠ وذكر في الجامع الصغير رجل قال لامرأته بالفارسية اگر تو امشب در خانه باشي(٢) فانت كذا فخرجت مع زوجها من ساعتها و باتت معه في منزله قالوا(٣) ان اراد بذلك ان تنتقل بمتاعها و قماشها يحنث ان تركت قماشها ثمه - و ان اراد النقل بنفسها لا غير لا يحنث - و ان اشكل على المرأة حلفته - فان حلف فحسابه على الله تعالى - وهذا ظاهر فيما اذا وقت فقال اگر درين روز اينجا باشي(٤) - و ان وقت بسنة كان ذلك على الانتقال بنفسهـــا و متاعها - و ان لم يوقت و لم يكن له نية وقت اليمين يحمل على الانتقال بنفسها *

1431 ١٤٣١ رجل اراد السفر فحلفه صهره و قال ان غبت بعد هذا عن امرأتك فلم ترجع اليها عند راس الشهر فامرأتك طالق فقال الختن بالفارسية هست و لم يزد على ذلك ثم غاب اكثر من شهر طلقت امرأته - لانه اجاب كلام الصهر و الجواب يتضمن اعادة ما في السوال فتطلق امرأته *

1432 ١٤٣٢ رجل حكى يمين رجل فلما بلغ الى ذكر الطلاق خطر بباله طلاق امرأته ان نوى عند ذكر الطلاق استيناف الطلاق و كان كلامه موصولا يصلح للايقاع على امرأته يقع الطلاق على امرأته - و ان لم ينو طلاق امرأته

(٢ ن) بدين خانه اندر باشي * (٣ ن) قال * (٤ ن) اگر اين دو روز اينجا *

بالسبب الذي تصادقا عليه و ذلك السبب باطل *

١٤٢٤ رجل قال لامرأته ان اشتريت بالخبز ماء فانت طالق فاشترت من 1424
السقاء ماء حمله من الوادي تطلق امرأته - و ان دفعت الخبز الى
السقاء و قالت احمل الماء الينا بهذا الخبز قال بعضهم لا يحنث
في يمينه - لان هذا استيجار و ليس بشراء *

١٤٢٥ امرأة كانت تبكي في بيتها فقال زوجها لصهرته ان لم تخرج ابنتك 1425
من هذا البيت و تبكي هناك فهي طالق فخرجت المرأة ثم دخلت
وبكت قال الفقيه ابو الليث رح ان كان يسمع بكائها في البيت احد
طلقت اذا بكت - لانه انما منعها من البكاء لاجل ذلك - و ان لم يكن
كذلك فاذا خرجت قبل ان تبكي بعد اليمين بطل اليمين فلا يحنث
ببكائها بعد ذلك *

١٤٢٦ امرأة قالت لزوجها ان خبزت حتى تأكل فجاريتي حرة فخبزت لجار 1426
لها فاكل منه الزوج لا تحنث - لان معنى كلامها ان خبزت لاجلك
فاذا لم تخبز لاجله لا تحنث *

١٤٢٧ رجل قال لامرأته ان دخلت دار فلان بغير مرادي و هوائي فانت طالق 1427
فارادت ان تذهب الى دار فلان فقال لها تو مي رو بر من چه مي آيد (٢)
هذا وعيد ليس باذن - فان (٣) دخلت يحنث *

١٤٢٨ رجل قال لاحدى امرأتيه حين سألت منه طلاق ضرتها اني لو طلقتها 1428
فانك تطلقين فقالت رضيت فطلق ضرتها ثم قال لهذه استبرئي ثم
انكر الطلاق قالوا لا يسع لهذه المرأة المقام معه - فان ارادت ان ترجع
اليه و لم يكن طلقها ثنتين قبل ذلك يحلف بالله ما اردت بكلامك

(٢ ن) تو مي شو بر من چه آيد * (٣ ن) و اذا دخلت *

الساعة فان لم تحمليه فانت طالق فذهبت و لم تقدر على الاسترداد ثم استردت منه في اليوم الثاني و حملته اليه قالوا يحنث في يمينه - لان قوله احمليه الي الساعة تنصيص على الفور *

1420 رجل قال لامرأته ان وطئت امتي فانت طالق فقالت الامة انه وطئني و كذبها المولى كان القول قول المولى - فان علمت المرأة بذلك لم يسعها المقام معه ولا ان تدعه ان يجامعها - و ان قال المولى اكرهته ام خوش آورده ام كان ذلك اقرارا منه و يحنث في يمينه *

1421 سكران ضرب امرأته فخرجت من داره فقال ان لم تعودي الي فانت طالق و كان ذلك عند العصر فعادت اليه عند العشاء قالو يحنث في يمينه - لان يمينه يقع على الفور - و ان قال لم انو الفور لا يصدق قضاء - و في المرأة اذا قامت لتخرج فقال الزوج ان خرجت فانت طالق فجلست ثم خرجت بعد ذلك بساعة لا يحنث في يمينه *

1422 رجل قال ان كنت فعلت كذا اين زن كه مرا بخانه است طلاق و قد كان فعل الا ان امرأته لم تكن في بيته وقت اليمين حنث في يمينه لان المراد من هذا الكلام هو المنكوحة - و لو كان قال اين زن كه مرا درين خانه است كذا و ليست امرأته في البيت الذي عينه لا تطلق امرأته - لان عند تعيين البيت لا يراد به المنكوحة *

1423 صبي قال ان شربت فكل امرأة اتزوجها فهي طالق فشرب و هو صبي فتزوج و هو بالغ و ظن صهره ان الطلاق واقع فقال هذا البالغ آري حرامست برمن قالوا هذا اقرار منه بالحرمة فتحرم امرأته ابتداء - وقال بعضهم لا يحرم امرأته وهو الصحيح - لانه ما اقر بالحرمة ابتداء و انما اقر

(۲ ن) حنث *

لانه ما اضاف الطلاق الى الملك و لا الى سبب الملك *

1415 ١٤١٥ رجل قال لعجوز انك امي فقالت لست امك فقال الزوج ان لم افتخر باموءتك فامرأته طالق قالوا لا يحنث في يمينه ما لم يقل بلسانه لا افتخر *

1416 ١٤١٦ رجل قال لامرأته و في يدها قدح فيه ماء فقال لها ان شربته فانت طالق و ان وضعته فانت طالق و ان صببته فانت طالق قالوا ترسل فيها ثوبا حتى ينشف الماء - قال مولانا رضي الله تعالى عنه لا حاجة الى هذا التكلف فانه لو اخذ منها غيرها او دفعت الى غيرها لا يحنث في يمينه *

1417 ١٤١٧ رجل قال لامرأته ان اشتريت جارية او تزوجت عليك فانت طالق واحدة فقالت لا ارضى بواحدة فقال لها فانت طالق ثنتين ان فعلت شيئا من ذلك فقالت لا ارضى بثنتين فقال فانت طالق ثلثا ان لم ترض بثنتين و لم يقل في هذه المرة ان فعلت شيئا من ذلك قال ابو نصر بن سلام رح الكلام الثالث بناء على ما تقدم ظاهرا *

1418 ١٤١٨ رجل قال لامرأته ان طلق فلان امرأته فانت طالق ثلثا و غاب فلان و اقامت امرأة الحالف البينة ان الغائب طلق امرأته بعد يمين زوجها قال ابو نصر الدبوسي رح لا تقبل هذه البينة و هو الصحيح - لانها قامت على شرط حقها فيما يتضرر به الغائب - و هذا بخلاف ما لو علق طلاق امرأته بدخول فلان الدار فاقامت امرأة الحالف البينة ان فلانا دخل الدار فانها تقبل و يقضي بطلاق الحاضرة - لان هذه بينة قامت على شرط حقها فيما لا ضرر للغائب *

1419 ١٤١٩ رجل قال لامرأته اذهبي الى فلان و استردي منه كذا و احمليه الي

لها تحت قدر آبريسم له بغير امره لا يحنث في يمينه *

1408 ١٤٠٨ رجل قال ان عمرت في هذا البيت فامرأته طالق فخرب حائط بين هذا البيت و بين جار له فعمره و قصد به عمارة بيت الجار لا عمارة هذا البيت قالوا يحنث في يمينه - و قصده باطل *

1409 ١٤٠٩ رجل قال لاصحابه ان لم اذهب بكم الليلة الى منزلي فامرأتي طالق فذهب بهم بعض الطريق فاخذهم اللصوص و حبسهم قالوا لا يحنث في يمينه - و هذا الجواب يوافق قول ابي حنيفة و محمد رحمهما الله تعالى - اصل المسئلة اذا حلف ليشربن الماء الذي في هذا الكوز اليوم فاهراقه قبل مضي اليوم لا يحنث عندهما *

1410 ١٤١٠ رجل قال ان ركبت فامرأته طالق فهو على ركوب الدواب من الفرس و الجمل و الحمار و البغل و نحو ذلك لاعلى ظهر انسان و حائط - و لو قال لا اركب مركبا فركب ظهر انسان قال بعضهم يحنث في يمينه - و قال بعضهم لا يحنث - و هو الصحيح لان الادمي لا يسمى مركبا *

1411 ١٤١١ رجل قال ان كذبت فامرأتي طالق فسئل عن امر فحرك رأسه بالكذب لا يحنث في يمينه ما لم يتكلم *

1412 ١٤١٢ رجل قال ان ضرطت فامرأتي طالق فخرج منه ريح بغير اختياره لا يحنث في يمينه - كما لو حلف لا يدخل دار فلان فادخل مكرها *

1413 ١٤١٣ رجل قال ان زنيت فامرأتي طالق فشهد عدلان على اقراره بالزنا طلقت امرأته و لا يحد - و ان شهد عدلان بمعاينة الزنا لا يحنث في يمينه و لا تطلق امرأته - و ان شهد اربعة فعدل منهم اثنان لا تطلق ايضا *

1414 ١٤١٤ رجل قال لامرأته ان فارقتك فكل امرأة اضع رأسي مع رأسها على المرفقة فهي طالق ففارقها و تزوج امرأة و وضع رأسه مع رأسها على المرفقة لم تطلق

نويت الفور قال بعضهم لا يصدق قضاء - و قال بعضهم يصدق - و هو الصحيح - لان يمينه ينصرف الى الخرجة التي قامت اليها من غير نية الزوج فاذا نوى الفور كان اولى ان يكون مصدقا *

1403 ١٤٠٣ رجل قال لامرأته ان صعدت هذا السطح فانت طالق فارتفعت بعض السلم لا يحنث في يمينه هو الصحيح - و لو قال لها ان ارتقيت هذا السلم او وضعت رجلك عليه فانت طالق فوضعت احدى قدميها على السلم ثم تذكرت فرجعت طلقت - لان الحنث تعلق بوضع القدم على السلم *

1404 ١٤٠٤ و لو قال ان وضعت قدمي في دار فلان فامرأته طالق فوضع احدى قدميه في الدار لا يحنث في يمينه - لان وضع القدم في الدار صار كناية عن الدخول عرفا فلا يحنث الا بالدخول - اما في هذه المسئلة لما ذكر الارتقاء و وضع القدم على السلم فقد بالغ في يمينه فتعلق الحنث بوضع القدم - هذا كما لو قال ان خرجت من هذه الدار او وضعت رجلك في السكة فانت طالق فوضعت قدمها في السكة حنث - و لو ذكر الخروج و لم يذكر معه وضع القدم في السكة فوضعت احدى قدميها في السكة لا يحنث *

1405 ١٤٠٥ رجل قال ان كان الله يعذب المشركين فامرأته طالق قالوا لا تطلق امرأته لان من المشركين من لا يعذب فلا يحنث *

1406 ١٤٠٦ رجل قال ان زرت فلانا حيا او ميتا فامرأته طالق فشيع جنازته قالوا لا يكون حانثا - لان التشييع لا يسمى زيارة - و عن ابي يوسف رح انه يحنث *

1407 ١٤٠٧ رجل قال ان انفقت من مال امرأتي فهي طالق فاحرقت المرأة سرقينا

فانت طالق فقامت من ساعتها قبل خروج الزوج و لبست الثياب و خرجت ثم رجعت و جلست حتى خرج الزوج فخرجت هي ايضا و انت دار والدته بعد ما اتاها الزوج لا يحنث - لان المرأة لما قامت تتهيأ للخروج لا ينقطع الفور فانها لواخذها البول فبالت ثم لبست الثياب للخروج لا يحنث - الا ترى انه لو قال لها ان لم تجيئي الى فراشي الساعة فانت طالق و هما في التشاجر فطال الكلام بينهما لا ينقطع الفور حتى لو ذهبت الى الفراش لا يحنث - و ان خافت فوت الصلوة فصلت قال نصير بن يحيى رح حنث الزوج - لان الصلوة عمل آخر بخلاف ما اذا كانا فيه - و قال بعضهم لا يحنث *

١٣٩٩ رجل اراد ان يجامع امرأته فلم تطاوعه فقال لها ان لم تدخلي معي البيت فانت طالق فلم تدخل في الفور و دخلت بعده قالوا ان دخلت بعد ما سكنت شهوته طلقت * 1399

١٤٠٠ رجل دعا جاريته الى فراشه فابت فقال ان لم تجيئي الليلة فانت حرة فجاءت من ساعتها فلم يجامعها لا تعتق - و كذا لو قال ذلك لامرأته و كذا لو قال لعبده ان لم تاتني الليلة حتى اضربك فاتاه و لم يضربه حنث في قول ابي يوسف رح - و قال محمد رح لا يحنث و عليه الفتوى - و لو قال لامرأته ان لم تاتيني لاجامعك فانت طالق فجاءت و لم يجامعها لا يحنث * 1400

١٤٠١ رجل قال لجماعة بالفارسية اگر بخانهٔ من مهمان نرويد فامرأته طالق فذهبوا الى بيته و لم يأكلوا شيئا لا يحنث في يمينه * 1401

١٤٠٢ رجل قال لامرأته عند خروجها ان رجعت الى منزلي فانت طالق ثلثا فجلست و لم تخرج زمانا ثم خرجت ثم رجعت فقال الزوج كنت 1402

اليه الاجر فنصح الزوج و لبست المرأة لا يحنث - لان الكرباس كسب المرأة لا كسب الزوج - و لان الشرط هو اللباس و لم يلبسها و ما لبست هي بامره فلا يحنث - و ان كان القطن من الزوج فكذلك لا يحنث ايضا للمعني الثاني *

١٣٩٥ اذا قال لامرأته انت طالق في صومك فنوت الصوم طلقت حين 1395
يطلع الفجر - و لو قال انت طالق في صلوتك لم تطلق حتى تركع و تسجد - لانه جعل الصوم والصلوة شرطا فصار كما لو ذكر حرف الشرط - و لو قال انت طالق لدخولك الدار او قال لحيضك تطلق في الحال و لو قال انت طالق بدخولك الدار او بحيضك لا تطلق حتى تدخل و تحيض - و كذا لو قال في دخولك الدار او في حيضك لا تطلق حتى تدخل و تحيض *

١٣٩٦ امرأة ذهبت الى منزل والدها في قرية اخرى فتبعها زوجها و سألها 1396
العود الى منزله فابت فحلف الزوج بطلاقها ان لم تذهب الى منزله تلك الليلة فخرجت معه و ذهب بها الى منزله قبل انفجار الصبح قالوا ان كان اكثر الليلة في تلك القرية يخاف عليه الحنث - و ان ذهب قبل ان يمضي اكثر الليلة يرجى ان لا يكون حانثا - والصحيح انه لا يحنث اذا ذهبت معه قبل مضي الليلة *

١٣٩٧ امرأة كانت مع زوجها في منزل والدها فقال لها زوجها اذهبي معي 1397
فابت فقال الزوج ان لم تذهبي معي فانت طالق ثلثا فخرج الزوج و خرجت هي على اثره و بلغت المنزل قبله قالوا ان خرجت بعده بحيث لا يعد ذلك خروجا معه حنث *

١٣٩٨ رجل قال لامرأته ان لم تقومي الساعة و تجيئي الى دار والدتي 1398

١٣٩٢ رجل قال لعبده ان احتلمت فانت حر فقال الغلام احتلمت 1392
و هو مشكل قبل قوله - لان احتلامه لا يقف عليه غيره فيقبل قوله في
ذلك - كما لو قال لامته و هي مشكلة الحال اذا حضت فانت حرة او
قال لامرأته اذا حضت فانت طالق فقالت حضت يقبل قولها - و عن
محمد رح انه لا يقبل قول الغلام - و يقبل قول الجارية و المرأة - لان الاحتلام
امر يقف عليه غيره فى الجملة - و لهذا جازت الشهادة على الاحتلام
بخلاف الحيض *

١٣٩٣ رجل قال لامرأته و هي حائض اذا حضت فانت طالق فهو على 1393
حيض فى المستقبل - و لو قال لها اذا حضت غدا فانت طالق و هو
يعلم انها حائض فهو على دوام ذلك الحيض الى الغد - ان دام الى ان
يطلع الفجر من الغد طلقت - لان الحيضة الثانية لا يتصور حدوثها فى الغد
فيحمل على الدوام اذا علم - و كذا لو قال لامرأته المريضة اذا مرضت
فانت طالق فهو على مرض فى المستقبل - و لو قال ان مرضت غدا
فهو على دوام ذلك المرض ظاهرا - و لو قال لصحيحة اذا صححت
فانت طالق يقع الطلاق كما سكت عن اليمين - لان الصحة امر يمتد
و في مثله للدوام حكم الابتداء فحنث للحال - كما لو قال لقائم اذا
قمت و لقاعد اذا قعدت و للبصير اذا ابصرت و للمملوكة اذا ملكتك
فانت حرة فانه يحنث كما سكت عن اليمين - لان للدوام حكم الابتداء
و الحيض و المرض و ان كان مما يمتد ايضا الا ان الشرع لما علق بالجملة
احكاما لا يتعلق ذلك بكل جزء من اجزائه فقد جعل الكل شيئا واحدا *

١٣٩٤ رجل قال لامرأته اگر من ترا از كار كردا خويش پوشانم فانت طالق 1394
فدفعت المرأة غزلها الى زوجها لينسج لها باجرة معلومة و دفعت

امرأته يحنث - لان شرط البر ذبح بقرة من بقرة الا اذا كان بينه و بين امرأته من الانبساط ما لا يميز كل واحد منهما ماله عن مال صاحبه - و لو تناول احدهما من مال صاحبه لا يجري المجادلة بينهما - و لو ذبح بقرة من بقره لكن ما اضافه بلحمها حتى رجع القادم قالوا ان كانت القرية التي انتقل اليها القادم قريبة لا يحنث في يمينه - و ان كانت بعيدة بحيث يعد سفرا يحنث عليه الحنث - لان في مدة السفر يتخذون الضيافة لاجله بعد الذبح فيصرف اليمين اليه (٢) *

١٣٩٠ امرأة قالت لزوجها انك تغيب و لا تخلف لي نفقة فغضب الزوج 1390 فقالت المرأة لم يكن هذا كلاما عظيما يحتاج الى الغضب فتغضب فقال الزوج ان لم يكن عظيما فانت طالق ثلثا و اراد به التعليق دون المجازاة قالوا ان كان الرجل محترما ذا قدر يكون مثل هذه الشكاية اهانة له لا تطلق - لان شكايتها بالذهاب بلا نفقة لعياله يكون عظيما - و ان لم يكن محترما ذا قدر طلقت *

١٣٩١ رجل قال ان بلغ ولدي الختان فلم اختنه فامرأته طالق قال الفقيه 1391 ابو الليث رح اذا اخر الختان عن عشر سنين ينبغي ان يحنث - لان عشر سنين نهاية وقت الختان - فان الصبي اذا بلغ عشر سنين يضرب على ترك الصلوة فيؤمر بالختان حتى يكون ابلغ في التطهير - و غيره من المشائخ قال لا يحنث ما لم يؤخر الختان عن ثنتى عشرة سنة وعليه الفتوى - لان هذا ادنى مدة يتصور فيها بلوغ الغلام - فان الصبي اذا بلغ هذا المبلغ وقال احتلمت يقبل قوله و يحكم ببلوغه - و قبل ذلك لو قال احتلمت لا يقبل قوله و لا يحكم ببلوغه *

(٢ ن) فينصرف *

دخلت الغيرة و لم تتكلم بها لا تطلق - لان ما في قلبها لا يمكن الاحتراز عنه لا يعتبر - كمن حلف لا يعادي فلانا فعاداه بقلبه و حفظ لسانه و و جوارحه لا يحنث في يمينه *

1384 ١٣٨٤ رجل قال لامرأته لست تحبينني فقالت له ان لم احبك فانت طالق ثلثا فقال لها الزوج بالفارسية خود توئي فقالت لا احبك ان قالت لا احبك قبل الافتراق عن المجلس طلقت ثلثا - و ان فارقته قبل ان تقول شيئا لا تطلق - لان قوله خود توئي ينصرف الى كلامها من وصف الزوج بالطلاق المعلق فصار الزوج قائلا بل انت طالق ثلثا ان لم تحبيني *

1385 ١٣٨٥ رجل دعى امرأته الى الفراش فقالت المرأة ما تصنع بي و يكفيك فلانة لامرأة اجنبية فقال الزوج ان كنت احبها فانت طالق تكلموا في ذلك - الصحيح انها لا تطلق مالم يقل الزوج احبها *

1386 ١٣٨٦ رجل قال لامرأته ان لم تكوني علي اهون من التراب فانت طالق لن كان يستهينها استهانة فاحشة يقول الناس انها اهون عليه من التراب لا تطلق *

1387 ١٣٨٧ رجل قال لامرأته ان قذفتك فانت طالق ثم قال لها يا ابنة الزانية تطلق لن في العرف هذا يعد قذفا للمرأة و ان كان في الحقيقة قذفا لامها *

1388 ١٣٨٨ رجل قال لامرأته ان شتمتك فانت طالق ثم قال لها لا بارك الله فيك لا تطلق - لانه لو علق عتق عبده بشتمه ثم قال لا بارك الله فيك لا يعتق عبده فكذا الطلاق *

1389 ١٣٨٩ رجل اتخذ ضيافة لقوم فدخل رجل من قرية اخرى فقال ان لم اذبح على وجه القادم بقرة من بقوري فامرأته طالق فذبح بقرة قبل ان يرجع القادم من بقوزة بر في يمينه و الا يحنث - و ان ذبح بقرة

من المنزل فقالت والدته منه ثوبانك و منه زن تو با تو فسمع الحالف ذلك طلقت امرأته *

1380 ١٣٨٠ رجل قال لامرأته ان اغضبتك فانت طالق فضرب صبيا لها فغضبت قالوا ان ضربه لشيء ينبغي ان يؤدب الولد على ذلك لا تطلق - لان هذا ليس موضع الغضب فلا يعتبر غضبها - و ان ضربه في موضع لا ينبغي ان يؤدب الولد تطلق امرأته *

1381 ١٣٨١ اذا قال لامرأته ان سررتك فانت طالق فضربها فقالت سرني قالوا لا تطلق امرأته - لانا نتيقن بكذبها - قال مولانا رضي الله تعالى عنه و فيه اشكال و هو ان السرور مما لا يوقف عليه فينبغي ان يتعلق الطلاق بخبرها و يقبل قولها في ذلك و ان كنا نتيقن بكذبها كما لو قال ان كنت تحبين ان يعذبك الله تعالى بنار جهنم فانت طالق فقالت احب يقع الطلاق عليها - و لو اعطاها الف درهم فقالت لم تسرني كان القول قولها و لا يقع الطلاق - لاحتمال انها طلبت الالفين فلا يضرها الالف *

1382 ١٣٨٢ و لو قال لها ان آذيتك فانت طالق فاشترى جارية و تسراها ان كان كلامه بناء على مقدمة يصرف معنى الاذى اليها سوى ما فعل لا تطلق ان اليمين انصرفت الى تلك المقدمة - و ان لم يكن تطلق - لان هذا معنى يعد اذى *

1383 ١٣٨٣ رجل اراد ان يشتري جارية فقال لامرأته ان اشتريت جارية فتدخل عليك من ذلك غيرة فانت طالق ثلثا فاشترى جارية و دخلت عليها الغيرة قالوا ان دخلت الغيرة عقيب الشراء يقع الطلاق - و ان دخلت بعد الشراء بزمان لا تطلق - لانه علق الطلاق بدخول الغيرة عقيب الشراء بلا فصل - و انما يعلم ذلك بكلامها من اللجاج و التكلم بالقبيح - اما اذا

و غلمها لا يقف عليه غيرها فتعليق بالاخبار عنها *

1374 ١٣٧٤ و لو قالت لزوجها يا كوسج فقال الزوج ان كنت كوسجا فانت طالق ثلثا و نوى به التعليق عن ابي حنيفة رحمه الله تعالى انه قال يعد لسنانه ان كانت ثماني و عشرين طلقت - لانه كوسج - و ان كانت اسنانه ثلثين او اكثر فليس بكوسج - و في عرفنا الكوسج من كانت شعور لحيته على الذقن دون الخدين او كانت على الذقن و الخدين الا انها طاقات متفرقة غير متصلة - و ان كانت شعور الخدين متصلة بشعور الذقن فهو خفيف اللحية و ليس بكوسج *

1375 ١٣٧٥ امرأة قالت لولدها بالفارسية اي بلاية زاده فقال الزوج ان كان هو بلاية زاده فانت طالق ثلثا فان نوى المجازاة طلقت - و ان نوى التعليق ان علمت المرأة انه من الزنا تطلق ثلثا لوجود شرط الطلاق و لا يسعها المقام معه - و ان علمت انه ليس من الفجور لا تطلق *

1376 ١٣٧٦ رجل قال لامرأته ان شتمت امي او ذكرتها بسوء فانت طالق ثم قال لامرأته كانت امك سلام عليك فقالت المرأة لا بل امك قالوا ان كان ذلك في بلد يعدون هذا ذكرا بسوء كبلخ و غيره طلقت امرأته - ان في عرفهم هذا عبارة عن المكذبة - اما في عرفنا فهو عبارة عن افشاء السلام فلا يكون هذا ذكرا بسوء فلا تطلق *

1377 ١٣٧٧ رجل قال ان شتمت احدا فامرأته طالق فشتم ميتا طلقت امرأته *

1378 ١٣٧٨ اذا قال لامرأته اذا شتمتني فانت طالق و ان لعنتني فانت طالق فلعنته لقع واحدة - و لو قال لها ان شتمتني فانت طالق فلعنته طلقت امرأته *

1379 ١٣٧٩ رجل قال لوالدته بالفارسية اكر تو مرا تركي امروز فامرأته طالق فخرج

كان الزوج كما قالت يقع الطلاق و الا فلا *

١٣٧٢ و اختلفوا في معنى هذه الالفاظ - اما السفلة عن ابي حنيفة 1372
رحمه الله تعالى المسلم لا يكون سفلة و انما يكون السفلة هو الكافر - و
به اخذ المشائخ رح - و عن ابي يوسف رح السفلة هو الذي لا يبالي
بما يقال له من وجوه الذم و الشتم - و عن محمد رح السفلة هو الذي
يلعب بالحمام و يقامر - و قال خلف بن ايوب رح السفلة
هو الذي اذا دعي الى الطعام يحمل شيئا من المائدة - و قيل
هو الطفيلي - و قيل هو الحائك و الحجام و الدباغ - و قيل هو الذي
يختلف الى القضاة - و اما قرطبان قال ابو بكر الاسكاف رح القرطبان
هو الذي اذا رأى اجنبيا مع امرأته او اهله او محارمه يدعه و لا يتعرض
و قال ابو القاسم الصفار رح هو المسبب للجمع بين اجنبي و اجنبية
لامر مذموم - و قيل هو من يبعث امرأته مع غلامه البالغ او مزارعه
الى الضيعة او يأذن لهما في الدخول على امرأته عند غيبته - و اما
ثفل فهو و القرطبان سواء - و اما كشخان فهو حكي ان امرأة جاءت الى
ابي عصمة المروزي و قالت ان زوجي يأمرني كل يوم بالطبخ فقلت
له يوما اي كشخان الى متى اطبخ فقال لي ان كنت كشخانا فانت
طالق قال ابو عصمة رح لن كان زوجك اذا سمع ان رجلا يمد يده اليك
بسوء لا يبالي فهو كشخان - و ان لم يرض بذلك و ضربك على ذلك فهو
ليس بكشخان - و اما الماجن قال شمس الائمة الحلواني رح هو الذي
لا يبالي بما يسمع و يقال بالفارسية تيب شيب *

١٣٧٣ امرأة قالت لزوجها انك قرطبان فقال الزوج ان علمت اني قرطبان 1373
فانت طالق ثلثا فانها لا تطلق ما لم تقل علمت - لانه علق الطلاق بعلمها

ثقيل لا يحنث في يمينه الا ان ينوي ما عند الناس لان يمينه يقع علي ما عنده *

1369 ١٣٦٩ رجل هدده رجل بسلطان فقال المهدد ان كنت اخاف من السلطان فامرأتي طالق قالوا ان لم يكن به ساعة حاف خوف من السلطان و لا كان له جهة الخوف من جناية يخاف على نفسه بسببها من السلطان يرجى ان لا تطلق امرأته *

1370 ١٣٧٠ رجل تشاجر مع اخيه و اخته فقال لهما بالفارسية اكر من شمارا بكون خر اندر نكنم فامرأته طالق تكلموا في ذلك قال بعضهم لا يحنث ما داموا في الاحياء - و قال بعضهم يحنث للحال - لانه عاجز عن ذلك ظاهرا الا ان ينوي بذلك القهر و التضييق عليهما فلا يحنث ما داموا في الاحياء - فان مات الحالف او احد الاخوين قبل ان يفعل ذلك حنث و عليه الاعتماد *

1371 ١٣٧١ امرأة قالت لزوجها يا سفله او قالت يا قرطبان او يا كشخان او يا ثغال او شيئا من الشتم فقال الزوج ان كنت كما قلت فانت طالق ثلثا اختلفوا في ذلك - قال الفقيه ابو جعفر و ابو بكر الاسكاف رح تطلق المرأة كما قال - كان الزوج كما قالت او لم يكن - و عليه الفتوى - لان كلامه محمول على المجازاة ظاهرا جزاء لا نداتها زوجها - فان قال الزوج نويت به التعليق قال ابو بكر الاسكاف رح ديين فيما بينه و بين الله تعالى - و لايديين في القضاء لانه محمول على المجازاة ظاهرا - و قال الشيخ الامام ابو بكر محمد بن الفضل رح ان كان ذلك في حالة الغضب فهو على المجازاة - و لا يصدق في نية التعليق قضاء - و ان لم يكن في حالة الغضب ينوي في ذلك - فان قال نويت به التعليق ان

١٣٦٣ امرأة علمت ان زوجها طلقها ثلثا و هو ينكر و لا تقدر المرأة على منع 1363
نفسها منه وسعها ان تقتله - لانها عجزت عن دفع الشر عن نفسها فيباح
لها القتل - و لكن ينبغي ان تقتله بالدواء لا بآلة القتل - لانها لو قتلته
بآلة جارحة تقتل قصاصا *

١٣٦٤ رجل قال لامرأته ان فعلت كذا فنسائي طوالق ففعلت وقع الطلاق 1364
عليها و علي غيرها - لان المعلق بالشرط عند وجود الشرط كالمرسل - فصار
كانه قال بعد الشرط نسائي طوالق *

١٣٦٥ رجل قال لامرأته ان لم يكن فرجي احسن من فرجك فانت طالق و قالت 1365
المرأة ان لم يكن فرجي احسن من فرجك فجاريتي حرة قال الشيخ
الامام ابو بكر محمد بن الفضل ر ح ان كانا قائمين عند المقالة برت المرأة
و حنث الزوج - و لو كانا قاعدين بر الزوج و حنث المرأة - لان فرجها حالة
القيام احسن من فرج الزوج - و الامر على العكس في حالة القعود - و
ان كان الرجل قائما و المرأة قاعدة قال الفقيه ابو جعفر ر ح لا اعلم هذا
و ينبغي ان يحنث كل واحد منهما - لان شرط البر في كل يمين ان
يكون فرج احدهما احسن و عند التعارض لا يكون احدهما احسن
فيحنث كل واحد منهما *

١٣٦٦ سكران قال لامرأته ان لم يكن فلان اوسع دبرا منك فانت طالق قال 1366
ابوبكر الاسكاف ر ح هذا شيء غير معلوم و لا مقدور فلا يحنث *

١٣٦٧ رجلان قال كلوا حد منهما لصاحبه ان لم يكن رأسي اثقل من رأسك 1367
فامرأته طالق قالوا طريق معرفة ذلك انهما اذا ناما دعيا فايهما كان
اسرع جوابا فرأس الآخر يكون اثقل منه *

١٣٦٨ رجل حلف ان فلانا ثقيل و هو عند الناس غير ثقيل و عند الحالف 1368

رضي الله عنه و في هذا الجواب نظر - لان ذلك لا يعد مشطا *

1360 ١٣٦٠ رجل قال لامرأته ان كان فلان دخل هذه الدار اليوم فانت طالق ثم قال ان لم يكن فلان دخل هذه الدار اليوم فعبده حر طلقت امرأته و عتق عبده لان كل يمين اقرار منه بالحنث في اليمين الثانية *

1361 ١٣٦١ امرأة حملت ثوبا من ثياب زوجها فقال لها الزوج ان لم ترديي الثوب اليوم فانت طالق فذهبت لترد فلحقها زوجها و هي تأخذ من العيبة لترد على الزوج فاخذ الزوج من العيبة او منها قبل ان تدفع اليه لا يحنث استحسانا - و به اخذ الفقيه ابو الليث رح *

1362 ١٣٦٢ رجل ادعى على غيره الف درهم فقال المدعى عليه امرأتي طالق ان كان لك عليّ الف درهم و قال المدعي ان لم يكن لي عليك الف درهم فامرأتي طالق فاقام المدعي بينة على حقه و قضى القاضي به فرق بين المدعى عليه و بين امرأته - و هذا[٢] قول ابي يوسف رح و احدى الروايتين عن محمد رح - و عليه الفتوى - فان اقام المدعى عليه البينة بعد ذلك انه كان[٣] اوفاه الف درهم قبل دعواه و يبطل تفريق القاضي بين المدعى عليه و بين امرأته - و تطلق امرأة المدعي ان كان المدعي يزعم انه لم يكن له على المدعي عليه الا الف درهم - و ان اقام المدعي البينة على اقرار المدعى عليه بالف درهم قالوا لم يفرق القاضي بين المدعى عليه و بين امرأته - قال مولانا رضي الله تعالى عنه و هذا مشكل - لان الثابت بالبينة كالثابت عيانا و لو عاينا اقرار المدعى عليه على نفسه بالف درهم للمدعي فرق القاضي بينه و بين امرأته *

(٢ ن) و هذا قول ابي حنيفة و ابي يوسف رحمهما الله تعالى * (٣ ن) كان اوفاه الف درهم قبل دعواه و يبطل تفريق القاضي *

لو اكثر ففي اليمين بالطلاق يقع الطلاق - و في اليمين بالله كان الحكم ما قلنا - و لو قال اكربا من سهم است ان كان صعه ما او علم المسرق بذلك اخذوا منه خمسة و الا فلا - لان يمينه يقع على ما يظنون منه *

1355 ١٣٥٥ جماعة قطعوا الطريق على رجل و اخذوا منه ماله و حلفوه بالطلاق ان لا يخبر احدا بخبرهم فاستقبله القافلة فقال للقافلة على الطريق ذئاب ففهم القافلة و انصرفت قالوا ان اراد بالذئاب اللصوص طلقت امرأته لانه اخبر بامرهم - و ان اراد حقيقة الذئاب ليرجعوا لا تحنث - لانه لم يخبر بخبرهم *

1356 ١٣٥٦ جماعة دخلوا في الليل على رجل و ذهبوا بكل شيء و حلفوه بان لا يخبر باسمائهم و هم في المسكة يراهم فالحيلة فيه ما نقل عن ابي حنيفة رحمه الله تعالى ان يكتب اسامي جميعهم و يأمر حتى يعرض عليه فيقال هل كان السارق هذا فيقول لا حتى ينتهي اليهم فيسكت او يقول لا ادري فيظهر السارق و لا يحنث الحالف *

1357 ١٣٥٧ رجل قال لامرأته بعد ما اصبح ان لم اجامعك الليلة فانت طالق و لم ينو شيئا ان كان يعلم انه اصبح كانت يمينه على الليلة القابلة و ان قوى الليلة الماضية لا ينعقد يمينه في قول ابي حنيفة و محمد رحمهما الله تعالى *

1358 ١٣٥٨ رجل قال لامرأته ان وضعت جنبك الليلة حتى اضربك فانت طالق فلم يقدر على ضربها تلك الليلة و لم تضع جنبها و نامت قاعدة لا تحنث في يمينه *

1359 ١٣٥٩ رجل قال لامرأته ان مشطت احدا فانت طالق فاتت امرأة اخرى قد سرحت رأسها فعقدت شعرها قالوا تطلق المرأة - قال مولانا

في رواية كتاب العين و الدين - لان الدراهم مع الدنانير جعلا جنسا واحدا في بعض الاحكام لاتحاد المقصود منهما و هو الثمنية - اما الاعيان لم تجعل جنسا للائتمان لاختلاف الصورة و المقصود - و ذكر في الكتاب رجل رهن عينا بدين ثم جاء الراهن و اراد ان يأخذ عينه من المرتهن و جحد دين المرتهن و اراد ان يحلف المرتهن ما له هذا العين في يده كان للمرتهن ان يحلف بالله ما له عندي هذا العين الذي يدعي و يفوي بذلك ما له عندي هذا العين الذي يجب علي تسليمه اليه و لا يحلف من غير هذه النية - هذا اذا كان الثوب قائما - فان كان الثوب هالكا عند السارق ففي هذا الجواب ايضا نظر - لان على قول ابي حنيفة رحمه الله تعالى حق المسروق منه في الثوب بعد هلاكه قائم - و لهذا لو صالح من الثوب على اضعاف قيمته جاز الصلح عنده - و انما ينتقل حقه عن الثوب الى القيمة بالقضاء و لعل القاضي يقضي بالقيمة من الدنانير لا من الدراهم *

١٣٥٤ رجل حلفه اللصوص بالطلاق(٢) الثلث ان ليس معه دراهم غيرما اخذوا 1354 منه فحلف بالطلاق على ذلك قالوا ان كان معه اقل من ثلثة دراهم لا يحنث - لانه ذكر في اليمين الدراهم و اسم الدراهم لا يتناول ما دون الثلث - و ان كان معه ثلثة او اكثر فان كانت اليمين بالطلاق وقع الطلاق علم الحالف ما كان عنده او لم يعلم - و ان كانت اليمين بالله تعالى فان كان الحالف عالما بما كان عنده من الدراهم لا كفارة عليه - لان يمينه كانت غموسا - و ان لم يعلم بذلك لا كفارة عليه ايضا - لان يمينه كانت لغوا و ان حلف بالفارسية و قال اگر با من درمي هست و كان معه درهم

(٢ ن) بالطلقات الثلث *

ان ذلك الثوب كان هالكا وقت يمينه لا يحنث - و ان عرف انه كان قائما او لم يعرف حاله حنث في يمينه - لان القيام اصل - هذا كالرجل اذا باع ثوب الغير بغير امر المالك و سامه الى المشتري فاجاز صاحب الثوب بيعه ان علم ان الثوب كان قائما وقت الاجازة او لا يدرى انه قائم او هالك صحت الاجازة - و ان علم انه كان هالكا وقت الاجازة لا تصح *

١٣٥٢ رجل دفن ماله في منزله فطلب و لم يجد فحلف بالطلاق انه 1352
ذهب ماله قالوا ان لم يأخذه انسان يخاف عليه الحنث - لانه لم يذهب الا اذا نوى الذهاب عن طلبه - فصار ذهب عن حانوته ثوب لغيره فاتهم القصار اجيره و حلف الاجير بالفارسية و قال اگر من ترا زيان كرده ام فامرأته طالق و قد كان رفع الثوب حنث في يمينه - لان مقصود الحالف من اليمين الجناية عليه فيما كان في يده لا ازالة ملكه *

١٣٥٣ رجل دخل منزل رجل و سرق منه ثوبا فلم يطالبه حتى دفع السارق 1353
الى المسروق منه دراهم فجحد المسروق منه دراهمه و حلف قال ابو القاسم (٢) رح ان كان الثوب ذهب من يد السارق لا يحنث المسروق منه - لانه صادق - و ان كان قائما فلا اقول ان المسروق منه يحنث - لان على قول بعض الناس للمسروق منه و للمغصوب منه ان يحبس عن الغاصب و السارق ماله حتى يأخذ حقه - قال رضي الله عنه لابد من النظر في هذا الجواب - و ينبغي ان يحنث - لان الثوب اذا كان قائما فحق المسروق منه في ثوبه لا في قيمته - و لهذا لو ظفر صاحب الدين بعين من اعيان المديون ليس له ان يأخذه باتفاق الروايات - اما من له الدراهم على انسان اذا ظفر بدنانير مديونه كان له ان يأخذ الدنانير

(٢ ن) ابو القاسم الصفار *

وقوع الطلاق - لان رفع الالفين الدراهم قد يكون بهذا الطريق - و لهذا لو دخل جماعة دار انسان للسرقة و اخذوا متاعا و حمل المتاع احدهم و اخرج كان الكل سراقا *

1347 ١٣٤٧ امرأة رفعت من كيس زوجها درهما فاشترت به لحما فخلط اللحام الدرهم بدراهمه و قال لها الزوج ان لم تردي علي ذلك الدرهم اليوم فانت طالق تمضي اليوم رفع الطلاق لوجود شرطه - و ان اراد الحيلة للخروج عن اليمين تأخذ المرأة كيس اللحام و تسلم الى الزوج *

1348 ١٣٤٨ رجل قال لامرأته ان لم تردي علي الدنانير الذي اخذته من كيسي فانت طالق فاذا الدينار في كيسه لا تطلق امرأته *

1349 ١٣٤٩ حلف الوكيل او الاكار ان لا يسرق فاخذ العنب و الفواكه فاكل او حمل للاكل لا يحنث - لانه لا يعد سرقة - و ان حمل لا للاكل و لصاحب الكرم فيه حق في ذلك و لم يخبر لصاحب الكرم بذلك و لم يكن من رأيه ان يخبره بذلك حنث - لانه يعد سرقة - و فيما كان من الحبوب و غلة خيار زاد[٢] اذا اخذ شيئا من ذلك لا على وجه الحفظ بل لينفرد به حنث في يمينه - و غير الوكيل و الاكار اذا احمل شيئا من جميع ذلك على وجه الخفية حنث في يمينه - لانه سرقة *

1350 ١٣٥٠ رجل اتهم بسرقة شيء فحلف انه لم يسرق ذلك الشيء و لم يره و قد كان رآه قبل ذلك الا انه لم يعرفه قالوا يمينه يتقيد بالرؤية عند السرقة دلالة و لا يحنث في يمينه *

1351 ١٣٥١ رجل له ثوب فسرق منه او غصبه غاصب فحلف صاحب الثوب و قال ان كان لي ثوب كذا و سمى ذلك الثوب فامرأته طالق قالوا ان عرف

(٢ ن) خيار زاد *

الحالف - و ان علم انها فعلت ذلك طاعة لمولاتها حلف الحالف و ان لم يكن هناك دليل لسأل الجارية و يقبل قولها انها فعلت ذلك طاعة لمولاتها او لاجل المولى هكذا ذكر في الكتاب - قال مولانا رضي الله عنه و يحتمل ان يكون صورة المسئلة اذا سأل اهل تلك الدار من الجارية شيئا فابت و لم تعط فاخبر المولى بذلك فكره فقالت امرأة الحالف للجارية ارفعي من دار المولى بالجود من ذلك و اعطي الى تلك الدار ثم المسئلة الى آخرها *

١٣٤٤ رجل قال لامرأته ان اكلت والدتك من مالي شيئا فانت(٢) طالق ثلثا 1344 فطبخت المرأة قدر جار لها و جعلت فيها شيئا من مال زوجها من الخوائج فاكلت والدتها من ذلك القدر ان فعلت المرأة ذلك برضاء صاحب القدر و رضاء زوجها لا تحنث - لانه صار ملكا لصاحب القدر *

١٣٤٥ رجل قال لامرأته ان اعطيت من حنطتي احدا فانت طالق و قال 1345 نويت بذلك انها صدق ديانة لا قضاء - لانه نوى تخصيص العام و ذلك جائز فيما بينه و بين الله تعالى - و على قول الخصاف رح صحت نيته في مثل هذا مطلقا - قالوا هذا اذا قال بالعربية - فان قال بالفارسية لا يصح نيته - لان تخصيص العام من كلام العرب - و الصحيح انه لا فرق بين العربية و الفارسية و يصح نيته فيما بينه و بين الله تعالى هذا اذا لم يكن الحالف مظلوما - فان حلفه ظالم كان له ان يأخذ بقول الخصاف رح و ينوي الخصوص *

١٣٤٦ رجل قال لامرأته ان رفعت من كيسي دراهم فانت طالق فحملت 1346 المرأة رأس الكيس و امرت ابنتها بالرفع فرفعت قالوا يحانث عليها

(٢ ن) فانت طالق فطبخت *

الى الغامي فان كان الزوج لا يكره ذلك لا يحنث في يمينه - لان ذلك القدر لم يدخل في اليمين عادة - و ان كان الزوج يضن بذلك و يعتبره حنث في يمينه *

١٣٤١ رجل قال لابنه ان سرقت من مالي شيئا فانك طالق فسرق 1341 من دار الاب اجرة روي عن ابي يوسف رح انه سئل عن هذه فقال رح ان كان الاب يبخل بذلك عن الابن طلقت امرأته - و سئل محمد رح عن هذه فلم يجبه فقيل له ان ابا يوسف رح اجاب كذلك فقال و من يحسن مثل هذا الا ابو يوسف رح *

١٣٤٢ رجل قال لامرأته ان اعطيتك درهما لتشتري به شيئا فانت طالق 1342 فدفع اليها درهما و امرها ان تعطي فلانا ليشتري به شيئا للمرأة ثم تذكر الرجل يمينه فاسترد الدرهم منها فان كانت المرأة تشتري الاشياء بنفسها لا يحنث - و ان كانت لا تشتري بنفسها حنث لان شراءها ان تامر غيرها بذلك اذا لم تكن هي تشتري بنفسها - و هي نظير ما ذكرنا اذا قال لامرأته ان غزلت لاحد فانت طالق فامرت غيرها بذلك كان على هذا التفصيل *

١٣٤٣ رجل قال لامرأته ان تبعثين[٢] من هذه الدار الى تلك الدار شيئا فانت 1343 طالق ثم ان الحالف امر جاريته ان تعطي اهل تلك الدار كلما[٣] طلبوا فجاء انسان من تلك الدار فطلب شيئا فابت[٤] الجارية فعلم المولى بذلك فكره و غضب فقالت امرأة الحالف للجارية اذهبي و احملي من دار المولى باجود من ذلك الى تلك الدار فحملت الجارية قالوا ان علم بالدليل انها فعلت ذلك لاجل المولى لا لطاعة[٥] مولاتها لا يحنث

(٢ ن) بعثت (٣ ن) مثل ما * (٤ ن) فاعطت الجارية * (٥ ن) لا طاعة *

١٣٣٦ امرأة قالت لزوجها تعال حتى تتغدى فحلف ان لا يتغدى الا 1336
ان تطبخ غداء في قفيز من ملح قالوا تطبخ البيض في قدر فيه قفيز
من ملح ثم يتغدى و لا يحنث *

١٣٣٧ رجل قال لامرأته انك تفسدين كل طعام فان ادخلت عليك طعاما 1337
الى شهر فانت طالق فادخل الحالف لحما للاجراء ليحمل اليهم لا يحنث
في يمينه - لان يمينه وقعت على الادخال لمنفعة البيت دلالة *

١٣٣٨ رجل قال لامرأته ان لم تجيبيني بمتاع كذا غدا فانت طالق فبعثت 1338
المرأة بذلك المتاع على انسان فان كان الحالف نوى وصول المتاع
اليه غدا لا غير لا يحنث - لانه نوى محتمل لفظه - و ان لم ينو شيئا
او نوى حملها بنفسها حنث - و لا يكون اليمين على الوصول الا بالنية *

١٣٣٩ امرأة كانت ترفع من مال زوجها و تدفع الى غيرها لتغزل لها فقال 1339
لها الزوج ان رفعت من مالي شيئا فانت طالق فرفعت من ماله
شيئا و اشترت بذلك شيئا من الفامي لحوائج البيت او كانت جارة
لها تخبز في بيتها فاحتاجت الى شيء من الدقيق فاعطتها او
اقرضتها خبزا ان كان الزوج لا يكره ذلك منها لا يحنث في القرض
و اعطاء الدقيق - و اما في شراء ما يحتاج اليه في البيت ان
كانت هي تتولى الشراء من الفامي لا يحنث - لان الزوج لا يكره ذلك
و لا يريد باليمين - و ان لم تكن هي تتولى الشراء بنفسها حنث اذا
اشترت بذلك شيئا من الفامي *

١٣٤٠ رجل قال لامرأته اذا رفعت من شعيري تبعثين به الى الفامي 1340
فانت طالق و كانت في منزله دابة تربى بالشعير و بين يديها شعير
قد فضل من اكلها مقدار فبعثت المرأة بذلك الشعير مع شعير لها

يمينه ، لانه يراد باليمين احدهما دون الجمع *

1332 ١٣٣٢ رجل قال لامرأته لم اتغسلين هذه القصعة فقالت المرأة غسلتها فقال الزوج ان لم تكوني غسلتها فانت طالق ثلثا وكانت المرأة امرت خادمها بذلك و غسل خادمها قالوا ان كانت المرأة تغتسل بنفسها عادة و انما تأمر خادمها لا يحنث الزوج ، و ان كانت المرأة تغسل بنفسها عادة و عني الزوج ذلك وقع الطلاق *

1333 ١٣٣٣ رجل قال لامرأته ان نمت على ثوبك فانت طالق فاتكا على وسادة من وسائدها او اضطجع على فراشها او وضع رأسه على مرفقها قالوا ان وضع جنبه او اكثر بدنه على ثوبها يحنث ، و ان اتكا على وسادة او جلس عليها لا يحنث *

1334 ١٣٣٤ رجل قال لامرأته اكبر من ان تبيعي كبرة تمر بخمرم فانت طالق فسخنت قدرا طبخها غيرها و اكل الحالف لا يحنث ، لانه يراد بهذا الطبخ *

1335 ١٣٣٥ رجل قال لامرأته ان اكلت من القدر الذي تطبخين فانت طالق فوضعت المرأة قدرا في تنور فيه نار قد اوقدت المرأة فاكل الحالف من ذلك طلقت ، و ان كان قد اوقد غيرها تكلموا فيه ، و الصحيح انها تطلق ايضا ، لان التنور لو كان في سكة توقد فيه النار لامرأة و تضع كل واحدة فيه قدرها كان ذلك طبخا من كل واحدة ، و ان لم تكن في التنور نار فوضعت قدرها في التنور ثم اوقدت هي النار طلقت اذا كان لكل الحالف من ذلك ، و ان اوقد غيرها لم تطلق ، لان وضع القدر في التنور الذي ليس فيه نار لا يسمى طبخا ، و كذا الكانون على هذا الوجه *

يمينه - ان اخذ المتهم مع المتهم (٢) عرفا ان يجد مع المرأة في عمل اما وطئا او معانقة او كلاما فلا يحنث بدون ذلك *

١٣٢٨ امرأة قالت لزوجها انك نمت مع الجارية فقال الزوج ان نمت مع 1328
الجارية فانت طالق ثلثا و قالت المرأة ان كان في يمينك هذه معنى فانا طالق فقال الزوج نعم فانكان الزوج لم يعن معنى سوى ما نطق به لايحنث - و الا يكون حانثا و تطلق امرأته *

١٣٢٩ قيل لرجل انك تفعل بفلانة كذا و كانت تلك المرأة على السطح 1329
و امرأة اخرى على سطح آخر و السطوح متصلة بعضها ببعض و الليلة مظلمة فقال الرجل ان فعلت بتلك المرأة كذا فامرأته طالق ثلثا و لم يسمها و اشار بيده الى امرأة اخرى غير التي اتهم بها و قد كان فعل ذلك بتلك المرأة التي اتهم بها طلقت امرأة الحالف قضاء - لان قوله في اليمين تلك المرأة انصرف الى المرأة المذكورة اولا - ولا تطلق ديانة - لانه اشار الى غيرها - و كذلك رجل ادعى على رجل مالا فانكر فحلفه القاضي بالله ما له عليك هذا المال فحلف و اشار با صبعه في كمه الى رجل آخر ليس له عليه حق لا يحنث ديانة *

١٣٣٠ امرأة كانت تشتم زوجها فقال الزوج ان شتمتني فانت طالق ثلثا 1330
فقالت المرأة لولدها الصغير منه اي بالله بجه قال الفقيه ابو جعفر رح ان قالت المرأة ذلك لشيء كرهت من الولد لاتطلق - و ان قالت لشيء كرهت من ابيه تطلق ثلثا *

١٣٣١ رجل قال لامرأته ان دخلت دار فلان و فلان يدخل في دارك فانت 1331
طالق فدخلت المرأة دار فلان و فلان لم يدخل دارها حنث في

(٢ ن) مع المرأة *

طالق و قد كان نظر الى هذا الصبي و قبله حنث في يمينه - لان هذا يسمي ناحفاظيا *

1325 ١٣٢٥ رجل حلف لايقبل فلانا فقبل يده او رجله اختلفوا فيه - قال بعضهم لا يحنث - و قال بعضهم يحنث في الملتحي - و قال بعضهم ان عقد اليمين بالفارسية لا يحنث ما لم يقبل وجهه ملتحيا كان او امرد - و في العربية فرق بين الملتحي و غيره و هو الصحيح *

1326 ١٣٢٦ رجل له تلميذ فاتهمه والد التلميذ به فحلف الاستاذ انه لم يفعل شيئا مما اتهمه به و لم يتفكر في ذلك فقال والد التلميذ ان هذا التلميذ الآخر يقول رأيته يسير معه فقال الاستاذ ان رآني هذا التلميذ اسير معه فامرأته طالق و قد كان التلميذ رآه يساره في شيئ من امره بان يشتري شيئا او يحمل الى منزله شيئا لاينبغي له ان يعلم بذلك غيره قالوا نرجو ان لايكون حانثا - لان يمينه يقع على المسارة في النوع الذي اتهمه والد التلميذ به فلا يحنث بدونه - كما لو اتهمته المرأة بجارية فقال الرجل اكر بساوم وبرا فانت طالق ثم ضرب الجارية لايحنث - لان يمينه انصرف الى المس الذي ذكره المرأة - و كذا لو حلف الرجل و قال ان وضعت يدي علي جاريتي فهي حرة فضربها و وضع يده عليها لايحنث في يمينه لو كان يمينه لاجل المرأة او لامر يدل على انه يريد به الوضع في غير الضرب *

1327 ١٣٢٧ رجل اتهم امرأته برجل فدخل الزوج داره فوجد الرجل المتهم جالسا في موضع من الدار و المرأة قائمة في ناحية اخرى فلما خرج الزوج و الرجل المتهم حلف السلطان زوج المرأة انك لم تأخذ فلانا مع امرأتك فحلف الرجل بطلاق امرأته انه لم يأخذ فلانا مع امرأته لا يحنث في

لانطلاق - لانهما يعتبران عموم اللفظ - و ابو يوسف رح يعتبر الغرض *

1319 ١٣١٩ امرأة حلفت بالله كه حرام نكردستم و عنت انها لم تحرم الزنا و انما حرمه الله تعالى و قد كانت زنت لا تحنث في يمينها - و كذا لو حلف الرجل بهذه اليمين و عني به ذلك - لانه نوى ما يحتمل لفظه و انكان الحالف بالطلاق و العتاق لا يصدق قضاء *

1320 ١٣٢٠ رجل قال لامرأته ان فعلت حراما فانت طالق ثلثا ثم انها تكلمت بالكفر و لم يعلما بالحرمة و اقاما على ذلك اياما لا تحنث في يمينه لان يمينه وقعت على الزنا و انه وطئها عن شبهة فلا تحنث - كما لو حلف ان لا يفعل حراما فتزوج امرأة نكاحا فاسدا و جامعها لا يحنث لان يمينه يقع على الحرام المطلق *

1321 ١٣٢١ و لو حلف بطلاق امرأته ان لا ينظر الى حرام فنظر الى وجه اجنبية لا يحنث - و لو نظر الى فرجها من وراء ستر رقيق او زجاج او في ماء حنث في يمينه - لانه نظر الى فرجها - و لو نظر في مرآة لا يحنث لانه نظر الى عكس فرجها *

1322 ١٣٢٢ امرأة اتهمت زوجها بغلام فحلفته ان لا يأتي (٢) من الرجال فقبل غلاما او مسه بشهوة لا يحنث - فان جامع الغلام في الفرج او في غير الفرج يحنث و ان لم ينزل - لانه هو المراد عرفا *

1323 ١٣٢٣ رجل قال ان اتيت حراما فامرأته طالق فاتى بهيمة لا تطلق امرأته لانه لا يراد باليمين الا اذا كان الحالف رستاقيا من الجهال يمشي خلف الدواب *

1324 ١٣٢٤ رجل اتهم بصبي فقال بالفارسية اگر باوے ناحفاظي كرده ام فامرأته

(٢ ن) ان لا يأتي حراما فقبل غلاما *

فيحنث كما لو حلف ان لا يقرضا من رجل فاقرضا من رجل و غيره يحنث في يمينه - و كذلك لو حلف امرأة بهذا اليمين ثم اصابها زوجها و حاضت *

1312 ١٣١٢ و لو قال لامرأته ان اغتسلت منك عن جنابة فانت طالق فجامعها وقع الطلق و ان لم يغتسل *

1313 ١٣١٣ رجل قال لامرأته ان اغتسلت منك الى شهر فانت طالق فجامعها في المغازة و تيمم حنث في يمينه - لان يمينه وقعت على الجماع *

1314 ١٣١٤ و لو حلفت امرأة ان لا تغسل راسها عن جنابة زوجها فطاوعت زوجها في الجماع حنثت في يمينها - لان يمينها يقع على التمكين عن اختيار و ان جامعها مكرهة بحيث لا يمكن دفعه لا تحنث في يمينها *

1315 ١٣١٥ رجل قال لامرأته ان لم اجامعك على راس هذا الرمح فانت طالق فما داما حيين و الرمح قائم لا يحنث *

1316 ١٣١٦ رجل قال لامرأته ان لم اجامعك نهارا في وسط السوق فانت طالق ثلثا و طلب الحيلة في ذلك فجعلوا الحيلة ان يحملها على العماري و يدخل السوق فيطاها *

1317 ١٣١٧ رجل قال لامرأته اگر حرام كردة ترا سه طلق و قد كانت قبلت رجلا غير محرم لو جامعها اجنبي فيما دون الفرج لا يحنث في يمينه - لان يمينه يقع على الجماع عرفا *

1318 ١٣١٨ و لو قال لامرأته بالفارسية اگر با كسي تو حرام كني فانت طالق ثلثا فطلقها بائنة ثم جامعها في العدة قالوا في قياس قول ابي حنيفة و محمد رحمهما الله تعالى يحنث - و تطلق ثلثا - و في (٢) قول ابي يوسف رح

(٢ ن) و في قياس قول ابي يوسف *

جانب المرأة ان تبيت معه و هي لابسة قميصها - و شرط البر في جانب الرجل ان يبيت معها و هو لابس قميصها و قد وجد *

1307 ١٣٠٧ رجل قال لامرأته ان لم اطأك مع هذه المقنعة فانت طالق ثلثا ثم قال ان وطئتك مع هذه المقنعة فانت طالق ثلثا فالحيلة في ذلك ان يطأها بغير مقنعة فلا يحنث ما دامت المقنعة قائمة و هما حيان فان مات احدهما او هلك المقنعة حنث في يمينه *

1308 ١٣٠٨ رجل حلف لا يجامع امرأته فيما دون الفرج فلاعبها و مس ذكره احدى فخذيها او ادخل ذكره باطن احدى ركبتيها و انزل لايكون حانثا في يمينه - و يكون يمينه على المباضعة *

1309 ١٣٠٩ رجل حلف ان لايحل تكته بحلال او حرام فى الغربة فجامع امرأته من غير حل التكة بان لم يحل سراويله او لم يكن له سراويل او امر غيره حتى حل تكته فان كان نوى حقيقة حل التكة لا يحنث - و يكون مصدقا في ذلك قضاء و ديانة - لانه نوى الحقيقة - و ان كان نوى بذلك الجماع حنث في يمينه *

1310 ١٣١٠ حلف ان لا يفتح سراويله على امرأته و اراد به الجماع يكون موليا - و ان لم ينو به الجماع لا يكون موليا - و ان فتح سراويله لاجل البول ثم جامعها لا يحنث - لان فتح السراويل عليها ان يفتح لجماعها - فان فتح السراويل لجماعها فلم يجامع قالوا ينبغي ان يكون حانثا لوجود شرط الحنث و هو فتح السراويل لجماعها *

1311 ١٣١١ حلف ان لايغتسل عن امرأته هذه عن جنابة فجامع هذه ثم جامع اخرى او على العكس يحنث في يمينه - لان يمينه وقع على الجماع - ولو نوى حقيقة الاغتسال فكذلك - لانه اغتسل عنها وعن غيرها

١٣٠٢ رجل قال لامرأته ان اغتسلت عن جنابة ما دمت امرأتي فانت 1302
طالق ثلثا و ذكر هذا القول مرتين او ثلثا و كانت المرأة حاملا فلم يجامعها
حتى وضعت حملها ان وضعت حملها بعد ما مضت اربعة اشهر
من وقت اليمين بانت بواحدة بحكم الايلاء - و تنقضي عدتها بوضع
الحمل - فان وطئها بعد ذلك كان واطئا للاجنبية - و عليه التوبة
و الاستغفار - و لها عليه مهر مثلها ان لم يعلم الزوج ان كلامه كان ايلاء و انها
حرمت عليه - و بطل اليمين - فان تزوجها بعد ذلك كانت امرأته
بتطليقتين و لا يحنث بوطئها بعد ذلك *

١٣٠٣ امرأة قذفها رجل بالزنا فقال له زوجها ان لم تثبت زناها اليوم فهي 1303
طالق ثلثا فهو كما قال ان لم تثبت زناها اليوم تطلق ثلثا - و اثبات ذلك
يكون باقرار المرأة او باربعة من الشهود *

١٣٠٤ رجل قال لامرأته في غضب ان فعلت كذا الى خمسين سنة فصيري 1304
مطلقة ففعلت قالوا ان كان الرجل حلف بطلاقها يقع الطلاق - و ان لم يكن
حلف بطلاقها و قال ذلك على وجه التخويف لم يقع - و يكون القول
قول الزوج انى قلت ذلك على وجه التخويف *

١٣٠٥ رجل قال لامرأته ان بت الليلة الا في حجري فانت طالق ثلثا فكانت 1305
في فراشه تلك الليلة الا ان الزوج لم يكن ادخلها في حجره لا يحنث
في يمينه - و لو قال بالفارسية اگر بكنار من اندر نيائي قالوا ينبغي
ان يكون حانثا - لان هذا الكلام لا يتناول الا حقيقة الحجر *

١٣٠٦ رجل قال لامرأته ان لم ابت معك الليلة مع قميصك هذا فانت 1306
طالق ثلثا و قالت المرأة ان بت معك مع قميصي هذا فجاريتي
حرة فلبس الرجل قميصها و باتا لا يحنثان - لان شرط الحنث في

١٢٩٦ سكران قال لامرأته وهبت داري هذه لك ثم قال ان لم اقل هذا من قلبي فانت طالق ثلثا ثم افاق و لا يذكر شيئا من ذلك قالوا لا تطلق امرأته - لان الظاهر ان ما يقول في تلك الحالة يقول من قلبه * 1296

١٢٩٧ سكران قالت له امرأته سر بر زمين نه فقال اگر من سر بر زمين نهم ترا طلاق و تنفس فقال مكر بمراد خويش - قال ان كان سكوته لانقطاع النفس يصح الاستثناء و يخرج وضع الراس على الارض بمراده من ان يكون شرطا للحنث - و ان كان سكوته لا لانقطاع النفس لا يصح الاستثناء - فان قال السكران لست اذكر من ذلك شيئا كانت يمينه يمين فور - لانه يريد به الفور ظاهرا * 1297

١٢٩٨ رجل قال لامرأته اذا دخلت الشام فاذا لم افارقك فانت طالق فهذا على الابد - و لو قال و ان لم افارقك يكون على الفور حين يدخل (٢) * 1298

١٢٩٩ رجل دفع الى امرأته درهما ثم قال لها ما فعلت بالدرهم قالت اشتريت اللحم فقال الزوج ان لم تردي علي ذلك الدرهم فانت طالق و قد ضاع الدرهم من يد القصاب قالوا ما لم يعلم انه اذيب ذلك الدرهم او سقط في البحر لا يحنث 1299

١٣٠٠ رجل قال لامرأته ان غسلت ثيابي فانت طالق فغسلت كمة او ذيله اختلفوا فيه - قال الفقيه ابوالليث و ابو سلمة رح لا يحنث في يمينه * 1300

١٣٠١ رجل ابان امرأته فقيل له انك تراجعها بعد شهر فقال الزوج ان راجعتها فهي طالق ثلثا فتزوجها في العدة او بعد انقضاء العدة حنث في يمينه - و ان كان الطلاق رجعيا فتزوجها لا يحنث في يمينه * 1301

(٢ ن) حتى يدخل *

الحالف اين الشاة فقالت امرأة الحالف شاة و لم تزد على ذلك ثم رفعت المتنقبة نقابها قالوا ان قصدت جوابها فقد كلمتها و حنث الحالف *

1291 ١٢٩١ رجل قال لامرأته ان اكلت من لبن بقرتك او من مصلها فانت طالق فباعت المرأة بقرتها من زوجها ثم حلبت و اكل الحالف لا يحنث في يمينه - قال مولانا رضي الله عنه هذا اذا كانت اليمين لملك المرأة *

1292 ١٢٩٢ رجل قال لانسان يقول شيئا يقول هذا من السكر فقال امرأتي طالق ان قلت هذا من السكر و لست بسكران قالوا ان كان كلامه مختلطا و بعد سكران عند الناس يكون حانثا في يمينه *

1293 ١٢٩٣ سكران دعا امرأته الى فراشه فابت فقال لها ان امتثلت امري و ساعدتني و الا فانت طالق فساعدته بعد مادعاها في المستقبل بعد اليمين لا يحنث في يمينه - فان دعاها في المستقبل و لم تساعده حنث - قال مولانا رضي الله عنه و ينبغي ان يحنث اذا لم تساعده و ان لم يجدد الدعاء - لان الناس يريدون بهذا الامتثال للامر السابق *

1294 ١٢٩٤ سكران اعطى امرأته درهما فقالت المرأة انك اذا صحوت تأخذ مني فقال ان اخذت فانت طالق ثم اخذ و هو سكران لا يحنث في يمينه لان شرط الحنث الاخذ بعد الصحو (٢) *

1295 ١٢٩٥ جماعة من النساء اجتمعن يغزلن لغيرهن على جهة القرض فغضب زوج واحدة و قال لها ان غزلت لاحد او غزلت احد لك فانت طالق فبعثت امرأة الى بيت هذه المرأة قطنا لتغزل لها فغزلت ام هذه المرأة قالوا ان كانت المرأة تغزل بنفسها فغزلت غيرها لا يقع الطلاق عليها بغزل غيرها *

(٢ ن) الافاقة *

الفقيه ابي حفص(٢) البخاري رح انه قال ان جامعها حتى انزلت فقد اشبعها *

1286 ١٢٨٦ رجل قال لامرأته ان حللت الثكة بالحرام منذ كنت امرأتي فانت طالق فقالت اخذني رجل وجامعني كرها قالوا ان كانت بحال لا تقدر على المنع لا يحنث - و ان قدرت حنث اذا صدقها الزوج في ذلك *

1287 ١٢٨٧ رجل قال لامرأته ان لم اقل عنك مع اخيك بكل قبيح فى الدنيا فانت طالق قالوا ان قال مع اخيها عنها بما هو من اخلاق اللئام و اللصوص و الخادعين و القاتلين يصير بارا في يمينه - و يأثم بذلك و يمينه هذه تقع على الكثير من ذلك - و اقله ثلثة انواع من القبح - و قال الفقيه ابو الليث رح ينبغي للحالف ان يقول عند الاخ بعد ما قال من القبائح انما قلت ذلك لاجل اليمين و هي برية عن ذلك - فيكون هذا الكلام توبة عنه عما قال فيها - و يكون بارا *

1288 ١٢٨٨ رجل قال ان اغتسلت من الحرام فامرأته طالق فعانق اجنبية فامنى و اغتسل قالوا يرجى ان لا يكون حانثا - و يمينه يكون على الجماع *

1289 ١٢٨٩ رجل قال ان ادخلت فلانا في بيتي فامرأته طالق لا يحنث في يمينه ما لم يدخل فلان بامر الحالف - و لو قال ان دخل فلان بيتي فدخل فلان باذن الحالف او بغير اذنه بعلمه او بغير علمه كان الحالف حانثا في يمينه - و لو قال ان تركت فلانا يدخل بيتي فدخل فلان بعلم الحالف فلم يمنعه حنث في يمينه - و الا فلا *

1290 ١٢٩٠ رجل قال لامرأته ان كلمت فلانة فانت طالق فدعيت امرأة الحالف الى عرس فجاءت المرأة التي حلف الزوج عليها متنقبة و قالت لامرأة

(٢ ن) ابي جعفر البخاري *

بخلاف البيع لانه بدله فيكون قائما مقامه *

١٢٨٢ رجل قال لامرأته ان خرجت من هذه الدار فانت طالق فدخلت 1282
كرما بابه في دار ليس له باب غير ذلك اختلفوا فيه (٢) - قال بعضهم
يحنث في يمينه - و قال بعضهم ان كان الكرم صغيرا يعد من الدار
و يفهم بذكر الدار لا يحنث في يمينه - و الا يكون حانثا *

١٢٨٣ رجل قال لامرأته ان دخلت دار اخي فانت طالق فسكن اخ الحالف 1283
دارا اخرى و دخلت المرأة تلك الدار الحديثة قال بعضهم ان كان يمينه
لغيظ لحقه من تلك الدار الاولى لا يحنث في يمينه - و ان كانت
يمينه لاجل الاخ حنث في يمينه - و ان لم يكن له في يمينه نية يحنث
في قول ابي حنيفة و محمد رحمهما الله تعالى - فان دخلت المرأة الدار
التي كانت لاخيه وقت اليمين ان كانت الدار في ملك اخيه الا انه
لا يسكن فيها حنث في يمينه - و ان خرجت تلك الدار عن ملك
الاخ بعد اليمين ببيع او هبة او غير ذلك لا يحنث - و ان مات الاخ
و صارت دار ميراثا لورثته فان دخلت بعد ما صارت ملكا لاحد الورثة
بالقسمة لا يحنث - و ان دخلت قبل القسمة اختلفوا فيه - و الاصح ان
لا يكون حانثا - و ان مات صاحب الدار و عليه دين مستغرق فدخلتها
حنث في يمينه *

١٢٨٤ رجل قال لامرأته ان ذهبت الى قرية كذا فانت طالق فذهبت الى 1284
قرية اخرى الا انها مرت في ضياع تلك القرية قالوا ان لم تدخل في
عمرانها لا يحنث في يمينه *

١٢٨٥ رجل قال لامرأته ان لم اشبعك من الجماع فانت طالق حكي عن 1285

(٢ ن) اختلف المشائخ فيه *

القرية التي خرجت اليها و مكثت هناك اياما قالوا ان انصرفت من الطريق و ذهبت اليها ثم انصرفت الى القرية الاولى لا يحنث في يمينه *

١٢٧٨ رجل قال لامرأته اگر ترا نيز برود بر من چنانكه تا اكنون رفت فانت 1278 طالق قالوا ان كان لكلامه مقدمة ينصرف اليمين الى المقدمة - و ان لم يكن و لم ينو شيئا ان كان يذكر عليها فيما زلت و لا يغمض شيئا لا يكون حانثا - و الا يكون حانثا *

١٢٨٩ رجل قال لامرأته اگر رشتهٔ تو يا كاز كردهٔ تو بسود و زيان من در آيد 1289 فانت طالق فغزلت المرأة و كست نفسها و صبيانها لا يحنث الرجل و كذا لو قضت بذلك دينا على زوجها - و انما يحنث اذا دخل ذلك في ملكه لا غير *

١٢٨٠ رجل قال لامرأته اگر برگ توت تو بسود و زيان من در آيد فانت 1280 طالق فاخذت من تلك الاوراق و القت على دودهٔ بغير امره لا يحنث كما لو علفت دابته ذلك بغير امره *

١٢٨١ رجل دفع الى رجل مصحفا ليصلحه فقال[٣] اگر بسود و زيان من 1281 در آيد فكذا فقرأ الحالف فيه قالوا يحنث في يمينه - قال رضي الله تعالى عنه اراد به اذا حلف الدافع اگر اين مصحف بسود و زيان من در آيد و لو وهب من الآخر لا بشرط العوض ثم عوض الموهوب له لا يحنث ولو باعه حنث - قال مولانا رضي الله تعالى عنه و ينبغي ان لا يحنث اذا قرأ فيه - لانه لا يراد باليمين ذلك - قال رضي الله تعالى عنه لان العوض اذا لم يكن مشروطا في العقد لم يكن انتفاعا بالمصحف

(٣ ن) فقال الآخذ اگر بسود *

رجل قال ابو القاسم رحمه الله تعالى ان نوى السقي او الدفع فهو على ما نوى - و ان لم ينو شيئا كانت يمينه على السقي و الدفع *

1272 ١٢٧٢ رجل قال لامرأته اگر از درم من برداري فانت طالق فرفعت (٢) المرأة دراهم زوجها في منديل فاعطت امرأة اخرى و قالت لها ارفعي منها شيئا فرفعت ثم دفعت اليها قال ابو القاسم و محمد بن سلمة رحمهما الله تطلق امرأته *

1273 ١٢٧٣ رجل قال لامرأته اگر من با تو خسبم فانت طالق و لم ينو شيئا قالوا يمينه تقع على الجماع - و يكون موليا - و ان نوى به النوم فهو على المضاجعة لا على الجماع - فلا يكون موليا *

1274 ١٢٧٤ رجل قال اگر فلان بخانهٔ من نيايد بشام فامرأته طالق فدعا فلانا الى بيته ليتعشى فتعشى فلان ثم جاء الى الداعي و الداعي ينتظره فاكل معه قالوا لا يكون حانثا في يمينه *

1275 ١٢٧٥ رجل قال لامرأته اگر اين جامه بر تن من آيد فامرأته طالق و كان ذلك قميصا فحمله على كتفه قالوا يمينه يقع على اللبس المعتاد في ذلك الثوب فلا يحنث بدونه *

1276 ١٢٧٦ رجل اتهم امرأته بالسرقة فقال لها انك تسرقين من دراهمي كذا اگر پس ازين از سيم من برداري فانت طالق فرفعت بالمكنسة في كنس البيت و وضعت في ناحية و اخبرت زوجها بذلك قالوا ان رفعت لا للحبس عن زوجها يرجى ان لا يكون حانثا *

1277 ١٢٧٧ امرأة خرجت الى قرية فقال لها الزوج اگر بيش از سه روز باشي فانت طالق فانصرفت في طريقها الى قرية اخرى ثم ذهبت الى

(٢ ن) فوجدت المرأة *

فهذا عذر - و الصلوة التطوع و الاكل و الشرب ليس بعذر فيكون حانثا *

١٢٦٦ امرأة قالت لزوجها لا طاقة لي بالكينونة معك جائعة فقال الزوج ان 1266
كنت جائعة في بيتي فانت طالق قالوا ان لم تكن جائعة في غير
الصوم لا يكون حانثا *

١٢٦٧ امرأة خرجت الى ضيافة فقال لها الزوج ان مكثت هناك اكثر 1267
من ثلثة ايام فانت طالق فرجعت في اليوم الثالث الى قرية زوجها ثم
ذهبت الى تلك الضيافة و مكثت هناك اياما قال الفقيه ابو الليث
رح ان دخلت عمران قرية زوجها حين رجعت ثم ذهبت بعد ذلك
لا يحنث - و ان لم تدخل عمران قرية زوجها ينبغي ان يحنث *

١٢٦٨ رجل قال لامرأته اگر ريسمان تو بكار برم يا بكار آيد مرا فانت طالق 1268
فاستبدل غزلا لها بغزل آخر او كرباسا نسج بغزلها بكرباس آخر فلبس ذلك
قال ابو بكر البلخي رح لا يحنث في يمينه - و لو قال اگر ريسمان تو
بكار برم فلبس ثوبا من غزلها قال ابو بكر لا يحنث في يمينه - فقيل (٢)
اگر بكار آيد فقال اخاف ان يكون حانثا باللبس *

١٢٦٩ رجل قال ان انتفعت بهذه الحنطة فامرأته طالق فباعها و انتفع 1269
بثمنها قال لا يحنث في يمينه *

١٢٧٠ و لو قال اگر (٣) رشتهٔ تو بر تن من آيد فانت طالق فوضع يده على غزلها 1270
او خاط بغزلها ثوبا و لبس او اتكا على مرفقة من غزلها او نام على
فراش من غزلها قالوا يمينه تقع على اللبس خاصة - و لا يحنث في
هذه الوجوه *

١٢٧١ رجل حلف و قال اگر كسے را نبيذ دهم فسقي رجلا او اهدى الى 1271

(٢ ن) فقيل له لو قال اگر بكارايد * (٣ ن) اگر از رشتهٔ تو *

١٢٦١ رجل قال لامرأته اگر تو زن من بودي يا باشي فانت طالق ثلثا تطلق 1261
ثلثا - فان تزوجها بعد ذلک لا يحنث مرة اخرى - لان اليمين انحلت
باحد الشرطين فلا يحنث مرة اخرى - كما لو قال لاجنبية ان تزوجتک
لو خطبتک فانت طالق فخطبها ثم تزوجها لا يحنث بالتزويج (٢) *

١٢٦٢ رجل رأى امرأته تعانق اختها و تقبلها فقال انک تحبينها اكثر مما 1262
تحبيني قالت نعم فقال الزوج اگر چنين است فانت طالق طلقت
امرأته لان المحبة لا تعرف الا بقولها *

١٢٦٣ رجل قال لامرأته (٣) اگر پيش بيرون شوي تا من نفرمايم فانت طالق 1263
قال ابو بكر الاسكاف رح ان نوى الاذن في كل مرة صحت نيته - و
لن نوى الاذن مرة واحدة فكذلک - و ان لم يكن له نية فهذا على مرة
واحدة - ثم قال الا اني اخاف ان يكون مراد الناس خلاف هذا *

١٢٦٤ رجل قال لامرأته شو تو وكيل من باش هرچه خواهي بكن فقالت اگر 1264
وكيل تو ام خود را دست بازداشتم بسه طلاق فقال الزوج ما اردت
التوكيل بذلک قال ابو القاسم رح ان كان ذلک حال طلب الطلاق لا يقبل
قول الزوج و يقع واحدة رجعية - و ان لم يكن ذلک حال طلب الطلاق
كان القول قول الزوج - قال مولانا رضي الله تعالى عنه و ينبغي ان يقع
الطلاق لعموم اللفظ *

١٢٦٥ رجل هو ببغداد فقال امرأتي طالق ما لم اخرج الى الكوفة فمكث 1265
ساعة الا انه يماكس في تلک الساعة مع المكاري في الكراء قالوا لا يحنث
في يمينه - و عليه الفتوى - الا اذا مكث و لم يشتغل بامر الخروج
فحينئذ يحنث في يمينه - و لو اشتغل بالوضوء للصلوة المكتوبة و نحوها

(٢ ن) بالتزوج * (٣ ن) اگر پيش بيرون شوي تا من بفرمايم فانت طالق *

واحدة بائنة متصلة بيمينه تطلق ثلثا *

1257 ١٢٥٧ ولو قال لامرأته ان انت امرأتي فانت طالق ثلثا طلقت ثلثا - و لو قال ذلك للمعتدة عن طلق الرجعي فكذلك - و ان قال ذلك للمباينة في العدة فان اراد به النكاح المطلق (٢) او لم يكن له نية لا يقع عليها طلق آخر - و ان نوى به الزوجية التي تكون بعد البائن في العدة طلقت اخرى *

1258 ١٢٥٨ رجل قال لامرأته ان تكوني امرأتي غير غد فانت طالق ثلثا ثم طلقها واحدة بائنة قبل الغد و مضى الغد بطل اليمين - و له ان يتزوجها بعد ذلك *

1259 ١٢٥٩ امرأة تخاصم ختنها فقال لها زوجها اگر تو نيز باوي داوري كني بنيک يا ببد فانت كذا ثم قالت المرأة لختنها اما ان تطلقها و اما ان تمسكها و تنفق عليها قال ابو القاسم رح ان لم يكن ختنها استشارها في ذلک الامر بل ابتدأت المرأة بهذا الكلام اخاف ان يحنث الحالف *

1260 ١٢٦٠ رجل قال اگر من امشب درين سراي باشم فامرأته كذا و توجه من ساعته للخروج فحمي و صار بحال لا يمكنه ان يخرج حتى اصبح قال ابو القاسم رح حنث في يمينه - فقيل له لو حبس كرها فتفكر ثم قال ينبغي ان لا يحنث في قول ابي حنيفة و محمد رحمهما الله تعالى و فرق بينه و بين الحمى - فقال في الحمى يمكنه ان يستأجر من يحمله و يخرجه او يستعين بغيره في ذلک - قال مولانا رضي الله عنه و ينبغي ان لا يحنث في الحمى ايضا في قول ابي حنيفة رحمه الله تعالى - لان عنده القدرة بالغير لا تعتبر كما في الصلوة و الحج و التيمم و غير ذلک *

(٢ ن) اذا لم يكن له نية *

اقامت معه - و ان ابى ان يحلف ترفع الامر الى القاضي حتى يحلفه بالله ما هي بطالق فان نكل فرق بينهما *

1252 ١٢٥٢ رجل حلف ان لا يشرب المسكر الى سنة فشرب في غير مجلس الشراب و رأوه سكران و هو يجحد شرب المسكر فشهدوا عند القاضي فلم يقض القاضي قال ابو القاسم رح للقاضي ان يحتاط و لا يقبل شهادة من لا يعاين الشرب - و على المرأة ان تحتاط لنفسها فى المفارقة بالغداء (٢) *

1253 ١٢٥٣ رجل قال لامرأته اگر كار كردة تو بسود و زيان من درآيد فانت كذا فعملت فى البيت من خبز او طبخ لا يحنث في يمينه *

1254 ١٢٥٤ رجل وضع دراهمه في يد امرأته ثم قال لها اگر ازين درم برداشتة فانت طالق (٣) ثم تبين انها رفعت فقال الزوج انما قلت ذلك بطريق الاستفهام و التخويف قال الفقيه ابو جعفر رح ان لم يذو شيئا يحنث في يمينه - و ان نوى الاستفهام كان القول قوله مع يمينه - قال مولانا رضي الله عنه و ينبغي ان لا يصدق قضاء - لانه يمين ظاهرا *

1255 ١٢٥٥ رجل قال لامرأته اگر تو فردا زن من باشي فانت كذا فلما جاء الغد قالت من زن تو نمي باشم فخلعها في صبيحة الغد قال بعض مشائخنا رح ان لم يكن له نية فخلعها قبل غروب الشمس من الغد كان بارا فان تزوجها بعد غد كانت امرأته بتطليقتين - و ان نوى بقوله ان كنت امرأتي غدا في شيء من الغد و اخر الخلع الى ما بعد طلوع الفجر من الغد كان حانثا *

1256 ١٢٥٦ و لو قال لامرأته ان تكوني امرأتي فانت طالق ثلثا فان لم يطلقها

(٢ ن) بالغداء * (٣ ن) فانت كذا *

فيما نوى - و ان قال اركس (٢) را دهي لا يصدق فيما نوى *

1245 ١٢٤٥ رجل حلف و قال ان غسلت امرأته ثيابه فهي طالق فغسلت لفافته قالوا لايكون حانثا الا اذا نوى ذلك - و لو اوصى بثيابه تدخل اللفافة في الوصية *

1246 ١٢٤٦ رجل حلف ان لا يأكل من مال ختنه شيئا فخبزت المرأة لابيها و جعلت في ذلك العجين من دقيق زوجها قالوا لايكون حانثا *

1247 ١٢٤٧ حلف الرجل ان لا يقرأ القرآن فقرأ التسمية لا غير قال ابو القاسم رح ان قرأ الذي في سورة النمل حنث - و الا فلا *

1248 ١٢٤٨ رجل حلف ان لايكون ابنه في منزله و ان يفارقه بعد اليوم فلما اصبح الابن تحول بنفسه و ثيابه و عياله قال ابو القاسم رح ان كان للابن في دار بيت معلوم ففرغ البيت عن جميع متاعه لايحنث في يمينه *

1249 ١٢٤٩ رجل حلف ان لايدخل دار امرأته قط فباعت المرأة الدار من رجل ثم استأجرها الحالف و دخلها قال ابو القاسم رح ان كان يمينه لملك المرأة لايحنث - و ان حلف لاجل الدار حنث *

1250 ١٢٥٠ رجل دعا امرأته الى الفراش فابت و قالت انك تعذبني فحلف ان لا يعذبها فدخلت في فراشه فجامعها ان جامعها كرها بغير مرادها حنث - و ان جامعها برضا ها لايحنث *

1251 ١٢٥١ رجل ادعى دابة في يد رجل انها له و حلف على ذلك بالطلاق وذواليد يقول الدابة لي بيقين قال الفقيه ابو جعفر رح لايحنث الحالف في الحكم - و على المرأة ان تحتاط و تحلفه على ذلك - فان حلف

(٢ ن) ار هيچ كسي را دهي *

١٢٣٩ امرأة اتهمت بالسرقة فامرت زوجها حتى(٢) يحلف بطلاقها انها لم تسرق 1239
فحلف الزوج فقالت المرأة قد كنت سرقت و صرت حانثا فيما حلفت
كان للزوج ان لا(٣) يصدقها لانها متناقضة *

١٢٤٠ رجل حلف بالطلاق على اني ان تزوجت ثيبا قط و قد تزوج بكرا 1240
فوجدها ثيبا قالوا ان صدقته المرأة انها كانت ثيبا كان لها عليه مهر
و نصف مهر مهر بالدخول و نصف مهر بالطلاق قبل الدخول بحكم
اليمين - و ليس لها نفقة العدة و السكنى - لانها معتدة بالوطي عن شبهة
و ان كذبته المرأة و قالت كنت بكرا فلها مهر ولحد - و عليه النفقـــة
و السكنى *

١٢٤١ رجل حلف بطلاق امرأته ان سرقت امرأته من دراهمه الى سنة ثم 1241
دفع الزوج اليها دراهم لينظر اليها فاخذت ثم ردت الي زوجها و رفعت
قطعة من غير علم الزوج فقال الزوج هل رفعت منها شيئا فقالت نعم
لا على وجه السرقة و ردت القطعة قال الفقيه ابوبكر البلخي رحمه الله
اخاف انها تطلق - و قال الفقيه ابو الليث رحمه الله ان لم تغـــارته و
لم تنكر ينبغي ان لا تطلق *

١٢٤٢ رجل حلف ان لم يكن بجامع امرأته الف مرة فهي طالق قالوا هذا 1242
على المبالغة و الكثرة دون العدد - و لا تقدير في ذلك و السبعون كثير *

١٢٤٣ حلف(٤) الرجل ان يطأ امرأته الليلة كالدر فسئل محمد رحمه الله فقال 1243
لا ادري هذا و قال ابو يوسف رحمه الله هذا على المبالغة في الجماع *

١٢٤٤ رجل حلف ان لا تعطي امرأته من دقيقه احدا و نوى بذلك امها 1244
خاصة قال ابو القاسم رحمه الله ان قال ار كسے را دهي صدق الزوج ديانة

(٢ ن) ان يحلف بطلاقها * (٣ ن) ان لا يطلقها * (٤ ن) رجل حلف *

نويت طلاقها مع عمرة طلقتا جميعا - و لو قدم الطلاق فقال يا عمرة انت طالق ان دخلت الدار و يا زينب فدخلت عمرة الدار طلقتا جميعا و لو قال لم انو طلاق زينب لا يقبل قوله - و لو قال انت يا عمرة طالق و يا زينب لم تطلق زينب الا ان ينويها - قال الا يرى انه لو قال لك يا فلان علي الف درهم و يا فلان كان المال للاول - و لو قدم المال فقال لك الف درهم علي يا زيد و يا سالم كان المال لهما جميعا - و لو قال يا عمرة انت طالق يا زينب فعمرة طالق دون زينب الا ان ينويها - و لو قال انت طالق يا عمرة يا زينب لم تطلق زينب الا ان ينويها - و لو قدم اسمهما فقال يا عمرة يا زينب انت طالق لم تطلق الاولى الا ان ينويها *

١٢٣٥ رجل قال لامرأته ان دخلت الدار ان دخلت الدار فانت طالق 1235
فهذا على دخلة واحدة - و لو قال ان دخلت الدار فانت طالق ان دخلت فهذا على دخلتين *

١٢٣٦ رجل قال لامرأته ان قلت لك انت طالق فانت طالق ثم قال قد 1236
طلقتك تطلق ثنتين واحدة بالتطليق و واحدة باليمين *

١٢٣٧ رجل قال ان تزوجت امرأة فهي طالق و ان تزوجت امرأتين فهما 1237
طالقان فتزوج امراتين معا فهما طالقان واحدة واحدة - واحدتهما تطلق ثنتين *

١٢٣٨ رجل قال لامرأته انت طالق انت طالق انت طالق ان شاء زيد 1238
فقال زيد شئت تطليقة واحدة قال ابو بكر البلخي رحمه الله لا يقع شيء و لو قال شئت اربعا فكذلك في قول ابي حنيفة رحمه الله - و على قول ابي يوسف و محمد رحمهما الله تعالى يقع الثلث اذا قال شئت اربعا *

لو قال ثم و انتما او قال فانتما *

١٢٣٠ و لو قال لها انت طالق لا بل انت فهي طالق واحدة بالكلام الاول 1230
و لا يلزمها بالكلام الثاني طلاق آخر الا ان ينوي - و لو قال انت طالق
لا بل انتما لزم الاولى تطليقتان و الاخرى واحدة *

١٢٣١ رجل له ثلث نسوة فقال لواحدة اذا طلقتك فالاخريان طالقتان ثم 1231
قال للاخرى مثل ذلك ثم قال للثالثة مثل ذلك ثم طلق الاولى واحدة
فانه يقع على الاخريين واحدة واحدة - و لو لم يطلق الاولى ولكنه طلق
الوسطى واحدة فانه يقع على الثالثة و الاولى واحدة واحدة ثم يعود
على الثالثة و على الوسطي علي كل واحدة تطليقة اخرى و لا يقع
على الاولى شيئ سوى الطلاق الاول - و لو لم يكن يطلق الاولى و الوسطى
و لكنه طلق الثالثة فانه يقع على الثالثة ثلث تطليقات و على الوسطى
و الاولى على كل واحدة ثنتان *

١٢٣٢ رجل له امرأتان زينب و عمرة فقال عمرة طالق الساعة او زينب 1232
طالق اذا دخلت الدار لم يقع الطلاق على احدهما حتى يدخل الدار -
فاذا دخل خير في ايقاعه على ايتهما شاء *

١٢٣٣ رجل قال لامرأته انت طالق او لست برجل او انا غير رجل فهي 1233
طالق - لانه رجل و هو كاذب في كلامه - و لو قال انت طالق او انا
رجل كان[٢] صادقا و لم تطلق امرأته *

١٢٣٤ رجل قال لامرأته اسمها عمرة ان دخلت الدار يا عمرة فانت طالق 1234
و يا زينب فدخلت عمرة الدار طلقت - و يسأل[٣] عن نيته في زينب
فان قال نويت طلاقها ايضا طلقت ايضا - و لو قال ذلك بغير واو فقال

(٢ ن) كان صادقا في كلامه * (٣ ن) سأل *

للمدعي عليه شيئ و شهدشاهدان ان على المدعى عليه الف درهم و قضى القاضي عليه بالف درهم للمدعي فالمدعي (٢) عليه يقول ما له علي شيئ حنث الحالف في قول ابي يوسف رح - و لا يحنث في قول محمد رح - و لو شهد شهود المدعي ان المدعي اقرضه الفا و قضى القاضي عليه بالف لا يحنث في قولهما *

١٢٢٦ رجل حلف بطلاق و حنث في يمينه و لا يدري انه كان حلف 1226
بواحدة او بثلث قال ابو يوسف رح يتحرى في ذلك و يعمل بما يقع عليه التحري - و ان استوى ظنه يأخذ بالاكثر احتياطا *

١٢٢٧ رجل قال لامرأته ان دخلت الدار فانت طالق ثم قال لامرأة له 1227
اخرى و انت طالق تطلق الثانية للحال - و يتعلق طلاق الاولى بالدخول و لو قال لاجنبية ان تزوجتك فانت طالق ثم قال لامرأة له و انت طالق طلقت امرأته للحال - و لو قال لاجنبية ان تزوجتك فانت طالق ثم قال لامرأته و هذه كان على النكاح كله *

١٢٢٨ رجل قال لامرأته المدخول بها انت طالق و انت او قال انت طالق 1228
او انت او قال انت طالق فانت طلقت المرأة واحدة الا ان ينوي بالكلام الثاني طلاقا آخر فيلزمه ذلك - و لو قال انت طالق و انت لامرأته له اخرى او انت او فانت طلقتا جميعا - فان قال لم انو بالكلام الثاني طلاقا لايدين فى القضاء *

١٢٢٩ و لو قال انت طالق و انتما وضم اليهـــا امرأة له اخرى طلقت 1229
الاولى ثنتين و الاخرى واحدة اذا ضم اليها من يلزمها الطلاق لزم الاولى من الطلاق مثل ما يلزم صاحبتها فى الكلام الثاني - و كذا

(٢ ن) و المدعى عليه *

رح - و لا تطـــلق في قول ابي يوسف رحـــمه الله . و كذا لو قال انت طالق ثلثا اولا او قال و الا او قال ان كان او قال ان لم يكن لا تطلق في قول ابي يوسف رح - و به اخذ محمد بن سلمة رح *

1217 ١٢١٧ رجل به فأفأة او ثقل في لسانه لا يمكنه اتمام الكلام الا بعد مدة فحلف بالطلاق و ذكر الشرط او الاستثناء بعد تردد و تكلف ان كان معروفا بذلك جاز استثناءه و تعليقه *

1218 ١٢١٨ رجل قال بالفارسية امرأته طالق اگر مرن و قطع الكلام قال ابوالقـــاسم رح لا يقع الطلاق كما قال ابو يوسف رح *

1219 ١٢١٩ رجل قال لامرأته انت طالق ابدا ما خلا اليوم طلقت للحال - كانه قال انت طالق تطليقة لا يقع عليك اليوم *

1220 ١٢٢٠ رجل قال كل امرأة لي طالق الا هذه و ليـــس له امرأة سواها لا تطلق امرأته *

1221 ١٢٢١ امرأة قالت لزوجها طلقني ثلثا فقال الزوج انت طالق فهي واحدة الا ان ينوي ثلثا - و لو قال قد فعلت طلقت ثلثـا - و كذا لو قال قد طلقتك *

1222 ١٢٢٢ ولو قالت المرأة طلقني فقال الزوج قد طلقتك ينوي ثلثا فهي واحدة *

1223 ١٢٢٣ و لو قال لامرأته طلقي نفسك فقالت قد فعلت و الزوج ينوي ثلثا فهي ثلث *

1224 ١٢٢٤ امرأة ادعت على رجل انها امرأته فحلف الرجل بطلاق امرأة له اخرى ما هي بامرأة له فاقامت المدعية البينة انها امرأته فقال الزوج قد كانت امرأتي فطلقتها قال لا يحنث في يمينه *

1225 ١٢٢٥ رجل ادعى قبل رجل مالا فحلف المدعى عليه بطلاق امرأته ما

1210 ١٢١٠ رجل قال لامرأته قبل الدخول اذا حضت فانت طالق فقالت حضت و تزوجت من ساعتها ثم ماتت قال محمد رح ميراثها للزوج الاول دون الثاني - و قال لا ندري اكان ذلك حيضا ام لا *

1211 ١٢١١ رجل له امرأة بنت اربع عشرة و غلام ابن اربعة عشر فقال للمرأة اذا حضت فانت طالق و قال للغلام اذا احتلمت فانت حر فقالت الجارية قد حضت و قال الغلام قد احتلمت قال يصدق الجارية[٢] و لا يصدق الغلام - قال لان في الغلام يمكن ان ينظر كيف يخرج منه المني - اما خروج الدم من الفرج لا يعلم انه حيض و لا يقف عليها غيرها فقبل[٣] قولها *

1212 ١٢١٢ امرأة قالت لزوجها طلقني طلقني طلقني فقال الزوج طلقت لن نوى واحدة فواحدة - و ان نوى ثلثا فثلث - و لو قالت طلقني و طلقني و طلقني فقال الزوج طلقت فهي ثلث *

1213 ١٢١٣ وكذا لو قالت خيرني خيرني خيرني فقال قد فعلت فطلقت نفسها فهي واحدة - و ان قالت خيرني و خيرني و خيرني فقال قد فعلت و طلقت نفسها فهي ثلث *

1214 ١٢١٤ رجل قال لامرأته ان وطئتك ما دمت معي فانت طالق ثلاثا ثم اراد الحيلة قال محمد رح يطلقها تطليقة بائنة ثم يتزوجها من ساعته فيطأها فلا يحنث *

1215 ١٢١٥ رجل قال لامرأته انت طالق و ان دخلت الدار طلقت للحال - و لو قال ان دخلت الدار انت طالق او[٤] قال فان دخلت الدار انت طالق طلقت للحال في هذه المسائل *

1216 ١٢١٦ و لو قال انت طالق ان و لم يزد عليه تطلق للحال في قول محمد

(٢ ن) المرأة * (٣ ن) فيقبل * (٤ ن) او قال و ان دخلت الدار الخ *

اذا دخلت الدار *

1203 ١٢٠٣ و لو قال انت طالق ان دخلت الدار ثلثا ينصرف الثلث الى الطلاق الا ان ينوي الدخول *

1204 ١٢٠٤ و لو قال انت طالق ان دخلت الدار عشرا فهذا على الدخول عشر مرات لا الى الطلاق *

1205 ١٢٠٥ و لو قال انت طالق ان دخلت الدار طالق طالق و كان ذلك قبل ان يدخل بها طلقت للحال واحدة بالوسطى - و اذا تزوجها فدخلت الدار طلقت بالاولى *

1206 ١٢٠٦ رجل قال لامرأته(٢) طالق ثلثا ان دخل الدار اليوم فشهد شاهدان انه دخل فقال الحالف عبدي حر ان كانا رأياني دخلت الدار لم يعتق عبده بقولهما رأيناه دخل الدار حتى يشهد شاهدان غير الاولين ان الاولين رأياه دخل الدار - و كذا لو قال الحالف للاولين عبدي حر ان لم يكونا شهدا علي بزور لا يعتق عبده *

1207 ١٢٠٧ رجل قال لامرأته اخبرتني بامر كذا فقالت لا فقال الزوج ان لم تخبريني فانت طالق ثلثا قال محمد رح هذا يكون على الابد الا ان ينوي الفور *

1208 ١٢٠٨ رجل قال لامرأته انت طالق ان كلمتك سنة اذهبي يا عدوة الله قال قد(٣) كلمها و حنث في يمينه *

1209 ١٢٠٩ رجل قال لامرأته اذا قلت لك يا زانية فانت طالق ثم قال لابنها يا ابن الزانية طلقت امرأته - فان نوى ان يواجهها دين فيما بينه و بين الله تعالى - و لا يدين في القضاء *

(٢ ن) لامرأته * (٣ ن) فقد كلمها *

اذا فرق القاضي بينهما و ان كان ذلك طلاقا *

1196 ١١٩٦ رجل قال اگر من اين زن را دست باز دارم تا اين فرزند زنده است فعبده حر ثم خلعها حنث في يمينه *

1197 ١١٩٧ رجل حلف ان لا يطلق امرأته فخلعها فضولي فبلغه الخبر ان اجاز خلع الفضولي باللسان حنث في يمينه - و ان اجاز بالفعل بان لم يقل شيئا بلسانه الا انه اخذ بدل الخلع قالوا لا يحنث في يمينه و عليه الاعتماد - و هذا و اجازة نكاح الفضولي سواء *

1198 ١١٩٨ رجل حلف بايمان مغلظة ان لا يطلق امرأته ثم اراد الخلاص منها من غير ان يكون حانثا فالحيلة في ذلك ان يتزوج رضيعة و يأمر اخت امرأته او ام امرأته ان ترضعها حتى تصير الرضيعة بنتا لاخت امرأته او تصير بنتا لام امرأته فيصير جامعا بين الاختين او جامعا بين المرأة و خالتها فيفسد نكاحهما جميعا *

1199 ١١٩٩ رجل قال لامرأته انت طالق ان دخلت هذه الدار و ان دخلت هذه الدار الاخرى فان دخلت احدى الدارين طلقت - و ان دخلت الدار الثانية و هي في العدة لا يقع طلاق آخر - و كذا لو قال ان دخلت الدار فانت طالق و ان دخلت هذه الدار الاخرى *

1200 ١٢٠٠ و لو قال انت طالق واحدة ان دخلت الدار ثنتين يقع ثنتان الساعة و واحدة اذا دخلت الدار - و ان لم يقل واحدة و لكن قال انت طالق ان دخلت الدار ثنتين يقع ثنتان اذا دخلت الدار مرة واحدة *

1201 ١٢٠١ و لو قال لامرأته انت طالق واحدة ان شئت ثنتين فان شاءت ثنتين فهي واحدة *

1202 ١٢٠٢ و لو قال انت طالق ان دخلت الدار طالق يقع واحدة للحال و الولي

تظهر في مسائل - منها هذه المسئلة - و منها لو قال ان شاء الله انت طالق يقع الطلاق في قول ابي يوسف رح - لان الشرط اذا تقدم على الجزاء لا يتعلق الطلاق الا بحرف الجزاء - فانه لو قال لامرأته ان دخلت الدار انت طالق يكون تنجيزا - و على قول محمد رح يصح الاستثناء تقدم او تأخر - لان عنده الاستثناء ابطال و ليس بتعليق فيصح على كل حال *

1192 ١١٩٢ رجل قال لغيره لي اليك حاجة اقتضيها فقال الرجل نعم و حلف بالطلاق او العتاق انه يقضيها له فقال الرجل حاجتي اليك ان تطلق امرأتك ثلثا فله ان لا يصدقه لانه متهم *

1193 ١١٩٣ رجل حلف رجلا ان يطيعه في كل ما يأمره به و ينهاه عنه ثم نهاه عن جماع امرأته فجامع الحالف لا يحنث ان لم يكن هناك سبب يدل عليه - لان الناس لا يريدون بهذا النهي عن جماع المرأة عادة - كما لا يراد به النهي عن الاكل و الشرب *

1194 ١١٩٤ حلف رجل بطلاق امرأته ان لا يطلق امرأته فآلى منها و مضت المدة و وقع عليها الطلاق بالايلاء فانه يقع عليها طلاق آخر بحكم اليمين *

1195 ١١٩٥ و لو حلف ان لا يطلق امرأته و هو عنين ففرق القاضي بينهما بالعنة لا يحنث في يمينه - لان وقوع الطلاق بحكم الايلاء يضاف اليه و لا كذلك الطلاق بتفريق القاضي بسبب العنة و ان كان كل واحد منهما طلاقا - و قال الفقيه ابو جعفر رح لا يحنث في الايلاء - و في اللعان في قياس قول ابي حنيفة و محمد رحمهما الله تعالى يحنث - و لا يحنث في قياس قول ابي يوسف رح - و قال الفقيه الليث رح و يجوز ان لا يحنث في اللعان اجماعا - و به نأخذ كما لا يحنث في العنين

الليلة و لم تدخل طلقت - لان التعليق بمشيئتها تفويض الطلاق اليها - ولهذا يقتصر على المجلس - و التطليق رفع القيد و فيما يرجع الى رفع القيد لا فرق بين ان يطلق و بين ان يفوض الطلاق اليها - و لا كذلك التعليق بدخول الدار و نحوه - لان ذلك ليس بتفويض - و لهذا لا يقتصر على المجلس - فاذا لم يصر الطلاق بيدها لا يصير الزوج مطلقا فيصير حانثا *

١١٨٩ رجل قال لامرأته ان تكلمت بطلاقك فعبدي حر ثم قال ان شئت فانت طالق فقالت لا لم شاء قال بعضهم يعتق عبده - لان شرط العتق التكلم بطلاقها و قد وجد - و كذا لو قال لغيره ان تكلمت بقذفك فعبدي حر ثم قال انت زان ان شاء الله تعالى يعتق عبده - و كذا لو قال ان تكلمت بالشرك ثم قال ان الشرك لظلم عظيم - و قال الحسن رح ينوي في جميع ذلك - و له ما نوى فان لم ينو شيئا فلا اراه حانثا - قال الفقيه ابو الليث رح القول الاول احب الي - و بعضهم اختار قول الحسن رح * 1189

١١٩٠ رجل قال لامرأته ان حلفت بطلاقك فانت طالق ثم قال لها ان دخلت الدار فانت طالق ان شاء الله تعالى لا يحنث في يمينه و لا تطلق امرأته لان الاستثناء في آخر الكلام يبطل حكم ما قبله - و اذا بطل الطلاق بطل اليمين - لان اليمين لا تبقى بدون الجزاء - و لهذا لو قال ان اقررت لفلان بعشرة دراهم فامرأتي طالق ثم قال لفلان علي عشرة دراهم الا درهما لا يحنث في يمينه - لانه ما اقر له بعشرة و انما اقر له بتسعة * 1190

١١٩١ ولو قال ان حلفت بطلاقك فانت طالق ثم قال لها انت طالق ان شاء الله طلقت امرأته في قول ابي يوسف رح - و لا تطلق في قول محمد رح لان على قول ابي يوسف رح قوله انت طالق ان شاء الله يمين لوجود الشرط و الجزاء - و على قول محمد رح ليس بيمين - و ثمرة الخلاف 1191

الله تعالى و عليه الفتوى ان يقول لامرأته في اليوم انت طالق ثلثا على الف درهم فاذا قال لها ذلك تقول المرأة لا اقبل فاذا قالت المرأة ذلك و مضى اليوم كان الزوج بارا في يمينه و لا يقع الطلاق - لانه طلقها في اليوم ثلثا - و انما لم يقع الطلاق عليها برد المرأة - و بهذا لا يخرج كلام الزوج من ان يكون تطليقا - الا ترى (٢) ان محمدا رح قال في الكتاب قال رجل لامرأته طلقتك ثلثا على الف درهم فلم تقبلي فقالت المرأة قبلت كان القول قول الزوج - و لا يقع عليها الطلاق - سمي كلام الزوج تطليقا من غير وقوع الطلاق - و هذا لان التطليق نوعان تطليق بمال و تطليق بغير مال - و قدمنا ما كان من جهة الزوج - و هو ايجاب الطلاق بخلاف التعليق - لان المعلق بالشرط عدم قبل وجود الشرط - فكان الا يجاب عدما قبل وجود الشرط - اما قوله انت طالق على الف تطليق في الحال لان كلمة على لا تقتضي عدم المذكور اولا بل تقتضي وجوده - تقول لرجل اكرمتك على ان تكرمني فيقتضي ذلك وجود الاكرام منه اولا - و لو قال اكرمتك بان تكرمني لا يقتضي ذلك وجود الاكرام منه - و انما يقتضي ذلك وجود الاكرام منه بعد اكرام المخاطب - و يصير كانه قال ان اكرمتني اكرمك *

١١٨٨ و لو قال لامرأته ان سألتني الليلة طلاقك فلم اطلقك فانت طالق ثلثا 1188
و قالت المرأة ان لم اسألك الليلة الطلاق فجميع ما املك صدقة على (٣) المساكين فسألت المرأة طلاقها في الليلة و قال لها الزوج انت طالق ان شئت فقالت المرأة لا اشاء و مضت الليلة لا تطلق و يكون الزوج بارا - و لو سألته طلاقها في الليلة فقال الزوج انت طالق ان دخلت الدار فمضت

(٢ ن) الا يرى * (٣ ن) في المساكين *

و ان ضربها بكف واحد لا تطلق الا واحدة و ان وقعت الاصابع متفرقة لان في اليدين تكرار الضرب - لان الضرب بكل يد ضربة على حدة - فكان ذلك بمنزلة الضرب بضغث واحد - اما في الوجه الثاني لم يتكرر الضربة - لان الاصل في الضرب هو الكف - و الاصابع تابعة لها - فلم يتعدد الضرب *

1184 ١١٨٤ رجل قال لامرأته كلما طلقتك فانت طالق فطلقها واحدة يقع طلاقان طلاق بالتطليق و طلاق بقوله كلما طلقتك فانت طالق - و لو قال كلما وقع عليك طلاقي فانت طالق فطلقها واحدة طلقت ثلثا - و لو قال اذا طلقتك واحدة فهي بائن او قال فهي ثلث فطلقها واحدة بعد الدخول طلقت واحدة رجعية في قوله فهي بائن - و كذا في قوله فهي ثلث *

1185 ١١٨٥ و لو قال اذا طلقتك فانت طالق و اذا لم اطلقك فانت طالق فلم يطلق حتى مات طلقت ثنتين في آخر جزء من اجزاء حيوته - لانه لما لم يطلق صار حانثا في اليمين الثانية فيقع عليها طلاق واحد - و اذا حنث في اليمين الثانية صار حانثا في اليمين الاولى فيقع عليها تطليقة اخرى *

1186 ١١٨٦ و لو قال اولا اذا لم اطلقك فانت طالق ثم قال و اذا طلقتك فانت طالق فلم يطلق حتى مات وقعت تطليقة واحدة باليمين الاولى - و ما يقع باليمين الاولى و هو سابق على اليمين الثانية لا يصلح شرطا للحنث في اليمين الثانية - لان الشروط تراعى في المستقبل لا في الماضي فلا يقع الا طلاق واحد *

1187 ١١٨٧ رجل قال لامرأته ان لم اطلقك اليوم ثلثا فانت طالق ثم اراد ان لا تطلق امرأته و لا يصير حانثا قالوا الحيلة في هذا ما روي عن ابي حنيفة رحمه

١١٨٠ رجل قال لامرأته ادخلي الدار و انت طالق فدخلت طلقت - و كذا[٢] 1180
لو قال لعبده ذلك - لان جواب الامر بحرف الواو كجواب الشرط بحرف
الفاء - و لهذا لو قال لعبده اد الي الفا وانت حر كان تعليقا باداء الالف *

١١٨١ رجل حلف بالفارسية و قال هر گاه كه من اين كار كنم فكذا - فهذه جملة 1181
الفاظ الفارسية هر وقت و هرگاه و هرچه گاه و هر زمان و همي و هميشه
و هربار في واحدة منها يتكرر الحنث بتكرار الفعل في قولهم - و هو قوله
هربار كما لو قال بالعربية كلما دخلت الدار فامرأته طالق فدخل الدار
مرارا يتكرر الطلاق بتكرر[٣] الدخول - و فيما سواها من الفاظ هر زمان و هرگاه
لا يتكرر الحنث بتكرار الفعل و لا يحنث الامرة واحدة - كما لو قال متى
دخلت الدار و متى ما دخلت الدار فامرأته طالق فانه لا يحنث
الا مرة واحدة - و قال بعضهم في قوله هر زمان و هرگاه يتكرر الحنث بتكرر
الفعل - لان قوله هر تفسير قوله كل و كلما فيوجب الاحاطة و التعميم - و
قال بعضهم لا يتكرر الحنث الا في قوله هربار - و عليه الاعتماد - و ذكر
محمد بن مقاتل الرازي في ترجمة قوله هر بار و هر زمان و هرگاه شبيه
بكل مرة و بكلما فيحنث في كل مرة - و قوله اگر و ار مثل قوله ان
دخلت الدار و لو دخلت فلا يحنث الا مرة واحدة - و قوله همي على
وزن متى فلا يحنث به الا مرة - و كذا قوله هميشه مثل قوله همي و
معناهما واحد - كما ان متى ومتما واحد لا يحنث فيهما الا مرة واحدة *

١١٨٢ رجل قال كلما قعدت عندك فامرأته طالق فقعد عنده ساعة طلقت ثلثا 1182
لان الدوام على القعود و على كل ما يستدام بمنزلة الانشاء *

١١٨٣ و لو قال كلما ضربتك فانت طالق فضربها بيديه جميعا طلقت ثنتين 1183

(٢ ن) و كذا لو قال ذلك لعبده * (٣ ن) بتكرار الدخول *

و ان زرع غلامه او اجيره الذي كان يعمل له ذلك قبل اليمين حنث في يمينه الا ان يعني عمله بنفسه *

١١٧٦ رجل قال لامرأته انت طالق كه اين كار كرده ام او قال كه اين كار نكرده ام 1176 و هو صادق فيما يقول اختلف المشائخ فيه - قال عامتهم منهم الشيخ الامام ابو بكر محمد بن الفضل رح هذا تنجيز و ليس بتعليق - الا ان يكون ذلك في موضع لا يكون تعليقهم الا بهذا اللفظ - و قال بعضهم هو تعليق و الذي يصحح هذا القول ما روي عن ابي يوسف رح - رجل قال لامرأته انت طالق لدخلت (٢) الدار فهو يمين كانه قال دخلت الدار ان لم اكن دخلته فامرأته طالق - و تفسير ذلك بالفارسية زن او وي بطلاق كه اين كار كرده است - فان كان فعل ذلك الفعل لا يحنث - و ان لم يكن فعل حنث في يمينه - و في عرفنا يستعمل هذا في التعليق - فان القاضي يحلف المدعى عليه بالله كه ترا اين مال دادني نيست بوي *

١١٧٧ رجل قال لامرأته انت طالق لا دخلت الدار فهو كقوله انت طالق ان 1177 كنت دخلت الدار *

١١٧٨ و لو قال انت طالق دخلت الدار طلقت للحال - لانه لم يوجد منه 1178 ما يكون تعليقا *

١١٧٩ رجل قال لامرأته انت طالق لو دخلت الدار لاطلقك فهو حلف بطلاقها 1179 ان لم يطلقها اذا دخلت الدار كانه قال اذا دخلت الدار اطلقك فانت طالق فان دخلت الدار يلزمه ان يطلقها - فان لم يطلقها حتى ماتت المرأة او مات الزوج يقع الطلاق - و هو بمنزلة ما لو قال ان دخلت الدار فعبدي حر ان لم اضربك *

(٢ ن) لو دخلت الدار *

۱۱۷۲ رجل قال لغيره زن وي از وي بسه طلاق اگر تو مهمان من نيائي قال 1172
الفقيه ابو جعفر رح هذا تعليق صحيح - كانه قال ان لم تجئ الي
ضيفا فامرأتي طالق - و كذا لو اتهم امرأته برفع شيئ فقال تو از من بسه
طلاق اگر تو اين نه برداشته و لم تكن رفعت تطلق ثلثا - لانه تعليق الطلاق
بعدم الرفع عرفا *

۱۱۷۳ رجل قال اگر مرا جز فلانه زن باشد هزار طلاق دادم او قال لاجنبية اگر 1173
جز از تو زن كنم او قال اگر جز تو مرا زن باشد فهي طالق فتزوج امرأة ثم
تزوج اخرى طلقت الاولى دون الثانية - لانه اذا لم يقل هر زنے كه مرا جز
تو بود لا يدخل في هذا اليمين الا امرأة واحدة - فاذا تزوج الاولى حنث
و وقع الطلاق و انتهت اليمين فلا تطلق الثانية - و كذا لو قال اگر مرا
بدين جهان زن بود سه طلاق فتزوج امرأة طلقت - فان تزوج اخرى لا تطلق
الثانية - لان هذا اليمين لم يتناول الا امرأة واحدة *

۱۱۷۴ رجل قال لامرأته تو هزار طلاق اگر فلان كار كني و اراد به التعليق 1174
قالوا لا يتعلق و لا يكون تنجيزا - و لو قال اگر فلان كار كني هزار طلاق
و اراد به التعليق كان تعليقا و عند المتاخرين يتعلق في وجهين - لانه
انما جعل تعليقا في تقديم الشرط باضمار الخطاب فيه فينبغي ان
يجعل تعليقا في تاخير الشرط و اضمار الخطاب ايضا *

۱۱۷۵ رجل قال اگر من هرگز كشت كنم بهذه القرية فامرأتي طالق قالوا 1175
ان زرع فيها زرعا او فاليزا او قطنا كان حانثا - و ان سقى زرعا او حصده
لا يكون حانثا - و كذا اذا كرب و لم يبذر لا يحنث - و لو دفع الى غيره
مزارعة او استأجر اجيرا فزرع اجيره ان كان الحالف ممن يباشر ذلك
بنفسه لا يحنث الا ان يعني ان لا يأمر غيره ذلك فح يكون حانثا

١١٦٨ الاخرس اذا كان لا يكتب و له اشارة معروفة في التصـــرفات في 1168
القياس لا ينفذ شيئ من تصرفاته من الطلاق و العتاق و البيع و نحوه
كما لا ينفذ من المريض الذي ثقل لسانه بمرضه - و هو قول مالك
و ابن ابي ليلى رح - و عندنا يثبت هذه التصرفات باشارته المعهودة
كما يثبت بكتابته - لانه لا يرجى منه العبارة فيقام الاشارة مقام العبارة
كما يقام الكتابة مقام العبارة و الله اعلم *

باب التعليق

١١٦٩ رجل قال لامرأته ا تريدين ان اطلقك فقالت نعم فقال لها اگر تو زن 1169
منـــي يک طـلاق وسه طلاق و هزار طلاق قومي و اخرجي من
عندي و هو يزعم انه لم يرد به الطلاق كان القول قوله - لانه لم يضف
الطلاق اليها *

١١٧٠ رجل قال لامرأته اگر تو بخانه مادر روي ترا طلاق فذهبت الى باب 1170
دارها و لم تدخل اختلف المشائخ فيه - و الصحيح انها لا تطلق - لانهم
يريدون بهذا المنع عن الدخول فلا تطلق بدونه *

١١٧١ رجل قال لامرأته اگر تو با كسے حرام كني فانت طالق فابانها ثم 1171
جامعها في العدة قالوا على قياس قول ابي حنيفة و محمد رحمهما الله
تعالى تطلق امرأته - و جعلوا هذا فرعا لما لو قال لامرأته كل امرأة
اتزوجها فهي طالق ثم ابانها ثم تزوجها طلقت عندهما لعموم اللفظ - و
لا تطلق عند ابي يوسف رح - و به اخذ الفقيه ابو الليث رح - لان
الظاهر انه لا يريدها بهذا اليمين *

١١٦٢ لو كتب الطلاق في وسط الكتاب و كتب قبله و بعده حوائج ثم محا 1162
الطلاق و بعث الكتاب اليها وقع الطلاق كان الذي قبل الطلاق اقل او
اكثر - و قال ابو يوسف رح كذلك ان كان ما قبل الطلاق اكثر - و
ان كان الاكثر ما بعد الطلاق لا تطلق *

١١٦٣ و ان كان فصل الطلاق في آخر الكتاب فمحا ما قبل الطلاق او محا 1163
اكثر ما قبل الطلاق من الكلمات و ترك فصل الطلاق لا تطلق *

١١٦٤ رجل كتب الى امرأته كل امرأة لي غيرك و غير فلانة طالق ثم محا 1164
اسم فلانة و بعث الكتاب اليها لا تطلق فلانة *

١١٦٥ و لو كتب الى امرأته اما بعد انت طالق ثلثا ان شاء الله ان كان 1165
موصولا بكتابته لا تطلق - و ان كتب الطلاق ثم فتر فترة ثم كتب ان
شاء الله طلقت امرأته - لان الكتاب من الغائب بمنزلة الخطاب من
الحاضر - و في الخطاب يعتبر الستثناء موصولا و لا يعتبر مفصولا *

١١٦٦ و لو كتب الى امرأته اذا جاءك كتابي هذا فانت طالق و وصل الكتاب 1166
الى ابيها فاخذ الاب و مزق الكتاب و لم يدفعه اليها ان كان الاب متصرفا
في جميع امورها فوصل الكتاب الى ابيها في بلدها وقع الطلاق - لان
وصول الكتاب الى الاب و هو متصرف في امورها كوصول الكتاب اليها
و ان لم يكن كذلك لا يقع الطلاق ما لم يصل اليها - و ان اخبرها الاب
بوصول الكتاب اليه فان دفع الاب الكتاب اليها و هو ممزق ان كان يمكن
فهمه و قراءته يقع الطلاق عليها - و الا فلا *

١١٦٧ رجل اكره بالضرب و الحبس على ان يكتب طلاق امرأته فلانة بنت 1167
فلان بن فلان فكتب امرأته فلانة بنت فلان بن فلان طالق لا تطلق امرأته
لان الكتابة اقيمت مقام العبارة باعتبار الحاجة و لا حاجة هنا *

١١٥٨ ثم المرسومة لا يخلو اما ان ارسل الطلاق بان كتب اما بعد فانت 1158
طالق - فلما[٢] كتب هذا وقع الطلاق - و يلزمه العدة من وقت الكتابة
و ان علق طلاقها بمجيء الكتاب بان كتب اذا جاءك كتابي هذا فانت
طالق فان[٣] لم يجيء اليها الكتاب لا يقع - و ان كتب اذا جاءك كتابي هذا
فانت طالق و كتب بعد هذا حوائج فجاءها الكتاب و قرأت او لم تقرأ
يقع الطلاق *

١١٥٩ و ان بدأ له بعد ما كتب فمحا الحوائج و ترك اذا جاءك كتابي 1159
هذا فانت طالق فجاءها الكتاب وقع الطلاق - لان قوله كتابي هذا
اشارة الى ما كتب قبل الطلاق - و اذا وصل اليها ذلك وقع الطلاق - و ان
بدأ له بعد ما كتب فمحا اذا جاءك كتابي هذا فانت طالق و ترك
الحوائج فوصل اليها ذلك لا يقع الطلاق - لان شرط وقوع الطلاق ان يصل
اليها ما كتب قبل قوله هذا فاذا محا ذلك لم يصل اليها ما يتعلق به
الطلاق - هذا اذا كتب الحوائج بعد الطلاق *

١١٦٠ فان كتب الحوائج اولا ثم كتب بعدها اذا جاءك كتابي هذا فانت 1160
طالق ثم محا الحوائج وترك اذا جاءك كتابي هذا فانت طالق فجاءها
ذلك لم يقع الطلاق - لان شرط وقوع الطلاق ههنا وصول ما كتب من
الحوائج قبل قوله اذا جاءك كتابي هذا و لم يصل اليها ذلك - و ان محا
قوله اذا جاءك كتابي هذا وترك ما قبله و وصل اليها ذلك وقع الطلاق *

١١٦١ فالحاصل ان ما كتب قبل قوله كتابي هذا اصل و ما بعده تبع - و 1161
العبرة للاصل دون التبع - و لان الكتاب ينسب الى المهم و المهم ما
يبدأ بذكره *

(٢ ن) فكما كتب هذا * (٣ ن) سالم يجيء *

١١٥٠ و لو اكره على شرب الخمر او شرب الخمر لضرورة و سكر و طلق اختلفوا 1150
فيه - و الصحيح انه كما لا يلزمه الحد لا يقع طلاقه و لا ينفذ تصرفه *

١١٥١ و عن محمد رح اذا شرب النبيذ و لم يوافقه فارتفع بخاره و صدع 1151
و زال عقله بالصداع لا بالشرب فطلق امرأته لا يقع - و لو زال عقله بالشرب
لو ضرب هو على رأسه حتى زال عقله فطلق لا يقع طلاقه *

١١٥٢ و ان شرب من الاشربة المتخذة من الحبوب و الفواكه و العسل اذا 1152
طلق او اعتق اختلفوا فيه - قال الفقيه ابو جعفر رح الصحيح انه كما
لا يلزمه الحد لا ينفذ تصرفه *

١١٥٣ و طلاق اللاعب و الهازل واقع * 1153

١١٥٤ و من زال عقله بالبنج او لبن الرماك لا ينفذ طلاقه و عتاقه * 1154

فصل في الطلاق بالكتابة

١١٥٥ الكتابة على نوعين مرسومة و غير مرسومة - و نعني بالرسومة ان يكون 1155
مصدرا معنونا مثل ما يكتب الى غائب - و غير المرسومة ان لا يكون
مصدرا معنونا *

١١٥٦ و هو على وجهين - مستبينة و غير مستبينة - فالمستبينة ما يكتب 1156
على الصحيفة و الحائط و الارض على وجه يمكن فهمه و قراءته - و غير
المستبينة ما يكتب على الهواء و الماء و شيء لا يمكن فهمه و قراءته *

١١٥٧ ففي غير المستبينة لا يقع الطلاق و ان نوى - و ان كانت مستبينة 1157
لكنها غير مرسومة ان نوى الطلاق يقع و الا فلا - فان كانت مرسومة يقع
الطلاق نوى او لم ينو *

واحدة بائنة في قولهم - و لو قال انت طالق كعدد الالف او كعدد
الثلث فهي ثلث في القضاء - و لو قال انت طالق كثلث فهي
ثلث - و لو قال انت طالق حتى يتم ثلث[٢] فهي ثلث - و لو قال
حتى اكمل لك ثلثا او حتى اوقع عليك ثلثا فهي واحدة *

1145 ١١٤٥ و لو قال انت طالق ملء البيت و لم ينو شيئا فهي واحدة بائنة *

1146 ١١٤٦ و لو قال انت طالق مثل الجبل او مثل حبة خردل فهي واحدة
بائنة في قول ابي حنيفة رحمه الله تعالى - و في قول ابي يوسف
رح واحدة رجعية - و لو قال مثل عظم الجبل او كعظم الجبل او شبه
بصغير او كبير فهي واحدة بائنة - و ان نوى ثلثا فثلث *

1147 ١١٤٧ و لو قال انت طالق هكذا و اشار باصبع واحدة فهي واحدة - و ان
اشار باصبعين فهي ثنتان - و ان اشار بثلاث فهي ثلث - و المعتبر
فيه الاصابع المنشورة دون المضمومة - فان قال عنيت الكف او المضموم
لا يصدق قضاء *

1148 ١١٤٨ و لو قال انت طالق مثل هذا و اشار[٣] الى ثلثة اصابع و نوى ثلثا
فثلث - و ان نوى واحدة فواحدة *

فصل في طلاق من لا يعقل

1149 ١١٤٩ طلاق المكره واقع عندنا خلافا للشافعي رح - و كذا طلاق السكران من
الخمر او النبيذ - و قال الكرخي و الطحاوي و هو احد قولي الشافعي
رح طلاق السكران غير واقع *

(٢ ن) الثلث * (٣ ن) و اشار بثلثة اصابع *

الطلاق و بالباقيتين العدة صحت نيته - و لو قال عنيت بالاولى و الثانية الطلاق و بالثالثة العدة صحت نيته ايضا *

1140 و لو قال اعتدي و كرر ذلك مرارا و قال عنيت به الحيض يصدق[٢] قضاء *

1141 و لو قال انت طالق فاعتدي و قال عنيت به العدة صحت نيته و ان عنى به تطليقة اخرى او لم ينو شيئا فهي تطليقة اخرى - و كذلك لو قال و اعتدي او قال اعتدي بغير حرف العطف - و عن ابي يوسف رح لو قال انت طالق فاعتدي و لم ينو شيئا فهي واحدة و لو قال و اعتدي او قال بغير حرف العطف يقع اخرى *

1142 رجل قال لامرأته في وسط النهار انت[٣] طالق اول هذا اليوم و آخره فهي واحدة - و لو قال آخر هذا اليوم و اوله طلقت ثنتين - لان الطلاق الواقع في اول اليوم يكون واقعا في آخره فلا يقع الا واحدة - اما اذا بدأ بآخر اليوم و الطلاق في آخر اليوم لا يكون واقعا في اوله فيقع طلاقان - و كذا لو قال انت طالق غدا و اليوم يقع طلاقان - و لو قال اليوم و غدا لا يقع الا طلاق واحد - و لو قال انت طالق اليوم و امس يقع طلاقان و لو قال امس و اليوم يقع واحدة - و لو قال انت طالق اليوم و بعد غد طلقت ثنتين في قول ابي حنيفة و ابي يوسف رحمهما الله تعالى *

1143 رجل قال لامرأته انت طالق كالف ان نوى ثلثا فثلث - و ان لم ينو شيئا فهي واحدة بائنة في قول ابي حنيفـــة و ابي يوسف الآخر رحمهما الله تعالى - و قال محمد رح هي في القضاء ثلث *

1144 و لو قال انت طالق واحدة كالف و نوى الثلث او لم ينو فهي

(٢ن) صدق ايضا * (٣ن) انت الق فاعتدي اول هذا اليوم و آخره فهي واحدة *

باز داشتمت او رها کردمت - و لو نوى الطلاق في قوله رها کردمت او يله کردمت يقع واحدة بائنة - و في قوله دست باز داشتمت يقع واحدة رجعية *

1136 ١١٣٦ و ان قرن الطلاق بهذه الالفاظ نحو ان يقول دست باز داشتمت بيک طلاق يقع واحدة رجعية و يكون العمل للطلاق - كما لو قال امرک بيدک في تطليقة او اختاري نفسک بتطليقة فاختارت نفسها يقع واحدة رجعية *

1137 ١١٣٧ و لو قال بهشتم او بهشتم از زني لايقع الطلاق في قول ابي حنيفة رحمه الله تعالى و ان كان ذلک في ذكر طلاق او خصومة - و اذا نوى الطلاق يقع واحدة رجعية - و عن ابي يوسف رح انه حين خالط العجم وجد هذا صريحا في العجم فقال يقع الطلاق و ان لم ينو في اي حال كان - و لا يدين قضاء انه عنى به الترک للخروج - و ان نوى بائنا او ثلثا فهو على ما نوى - لانه يحتمل ذلک في لغتهم *

1138 ١١٣٨ رجل قال لمنكوحته الامة انت بائن و نوى الثنتين صحت نيته - و لو قال ذلک لحرة طلقها واحدة و نوى الثنتين يقع واحدة *

1139 ١١٣٩ رجل قال لامرأته اعتدي اعتدي اعتدي و قال نويت بالكل تطليقة واحدة دين فيما بينه و بين الله تعالى - و في القضاء تطلق ثلثا و لو قال عنيت بالاولى الطلاق و لم اعن بالباقيتين شيئا طلقت ثلثا و لو قال لم اعن بالاولى شيئا و نويت بالثانية و الثالثة الطلاق فهما تطليقتان رجعيتان - و لو قال لم اعن بالاولى و الثانية شيئا و نويت بالثالثة الطلاق فهي تطليقة رجعية - و لو قال لم اعن بالاولى و الثالثة شيئا و نويت بالثانية الطلاق طلقت ثنتين - و لو قال عنيت بالاولى

١١٢٧ و لو قال بيزارم از زن و از خواسته ان نوى طلاقا يكون طلاقا و الا فلا * 1127

١١٢٨ و الواقع بالكنايات بائن عندنا الا الواقع بثلثة(٢) اعتدى استبرئي رحمك 1128
انت واحدة فانه يقع بها واحدة رجعية *

١١٢٩ و ان نوى الثلث بالكنايات يصح نيته الا في اربعة اعتدي استبرئي 1129
رحمك انت واحدة اختاري فقالت اخترت نفسي فانه لاتصح نية
الثلث في هذه الاربعة *

١١٣٠ و لاتصح نية الثنتين في الكنايات * 1130

١١٣١ و لو اوقع الطلاق بالفارسية فقال دست باز داشتمت و نوى الطلاق 1131
قال بعضهم هو تفسير قوله خليت سبيلك لايقع الطلاق ما لم ينو - و اذا
نوى يقع واحدة رجعية - وقال بعضهم هو تفسير قوله طلقتك يقع
الطلاق بلا نية و يكون رجعية - وقال الفقيه ابوالليث و الشيخ الامام
ابو بكر محمد بن الفضل رح يقع واحدة بائنة - و لا يصدق انه لم ينو
الطلاق - و عليه الفتوى *

١١٣٢ و لو قال پاي كشاده كردمت يقع واحدة رجعية في قولهم - و لا يحتاج 1132
الى النية - لانه تفسير قوله طلقتك *

١١٣٣ و لو قال بيك طلاق دست باز داشتمت يكون رجعيا - و لا يصدق انه 1133
لم ينو الطلاق *

١١٣٤ و لو قال چنگ باز داشتم از تو و نوى الطلاق قال الفقيه ابو جعفر رح 1134
يقع واحدة بائنة - و قال غيره يقع واحدة رجعية - و الاول اصح *

١١٣٥ و في فتاوى النسفي لو قال لها ترا يله كردم او رها كردم او دست 1135
باز داشتم او قال ترا هشتم لايقع الطلاق ما لم ينو - و كذا لو قال دست

(٢ ن) في ثلثة *

1117 و لو قال لها اذهبي فبيعي هذا الثوب او اذهبي فتقنعي او قومي فكلي و نوي الطلاق بقوله اذهبي و بقوله قومي لايقع الطلاق *

1118 و لو قال لها اربع طرق عليك مفتوحة و نوي الطلاق لا يقع الا ان يقول اربع طرق عليك مفتوحة فخذي في اي طريق شئت فم يقع الطلاق اذا نوى - و لو قال چهار راه بر تو كشادم لايقـــع الطلاق ما لم ينو *

1119 و لو قال تو سه بار ايدرن و قال لم انو الطلاق كان القول قوله *

1120 و لو قالت المرأة لزوجها طلقني فقال لا افعل فقالت ان لم تطلقني اذهب و اتزوج فقال الزوج خواهي شوي كن و خواهي دوست لا يقع الطلاق - لان هذا اظهار قلة المبالاة *

1121 ظن الرجل (۲) ان نكاح امرأته وقع فاسدا فقال تركت هذا النكاح الذي بيني و بين امرأتي ثم ظهر ان نكاحهما كان صحيحا لا تطلق امرأته *

1122 و لو قال لامرأته انا بري من طلاقك لايكون طلاقا - و لو قال برئت اليك من طلاقك يقع الطلاق نوى او لم ينو - و لو قال انا بريء من ثلث تطليقاتك قال بعضهم يقع الطلاق اذا نوى - و قال بعضهم لا يكون طلاقا و ان نوى - و هو الظاهر *

1123 قالت له امرأته گر ان نخريدة بعيب بازده فقال بازدادم قالوا لا يقع الطلاق *

1124 و لو قال اب المرأة لزوجها گر ان نخريدة ازمن بمن بازده فقال بنو بازدادم يقع الطلاق اذا نوى - كانه قال لها الحقي باهلك *

1125 و لو قال لها انت السراح فهو كما لو قال لها انت خلية *

1126 قالت المرأة لزوجها طلقني فقال الزوج ان شئت الف مرة لا يقع شيء *

(۲ ن) الزوج *

١١٠٨ وعن ابي حنيفة رحمه الله تعالى لو قال وهبتك(٢) لابيك او لامك 1108
او للازواج و نوى الطلاق يقع - و لو قال وهبتك لخالك او لاخيك
او لاختك او لفلان الاجنبي لايقع الطلاق و ان نوى - و كذا لو قال
لا حاجة لي فيك *

١١٠٩ و عن محمد رح لو قال لها افلحي و نوى الطلاق يكون طلاقا * 1109

١١١٠ و لو قال في حالة مذاكرة الطلاق فارقتك او باينتك او ابنتك او 1110
ابنت منك او لا سلطان لي عليك او سرحتك او وهبتك لنفسك او
تركت طلاقك او خليت سبيل طلاقك او سبيلك او انت سائبة او
انت حرة او انت اعلم بشانك فقالت اخترت نفسي يقع الطلاق
و ان قال لم انو الطلاق لايصدق قضاء *

١١١١ و لو قال لها لا نكاح بيني و بينك - او قال لم يبق بيني و بينك 1111
نكاح - او قال فسخت نكاحك يقع - الطلاق اذا نوى *

١١١٢ و لو قالت امرأة لزوجها لست لي بزوج فقال الزوج صدقت و نوى 1112
به الطلاق يقع في قول ابي حنيفة رحمه الله تعالى *

١١١٣ و لو قال لها تو مرا چيزى نباشي و كرر ذلك لايكون طلاقا - و كذا 1113
لو قال تو مرا كسي نئ *

١١١٤ و لو قال لم يبق بيني و بينك عمل يقع الطلاق اذا نوى - و كذا 1114
لو قال انا برئ من نكاحك يقع الطلاق اذا نوى *

١١١٥ و لو قال لا حاجة لي فيك و نوى الطلاق لا يقع - و كذا لو قال مرا 1115
بكار نيستي و كذا لو قال ما اريدك *

١١١٦ و لو قال لها ابعدي عني و نوى الطلاق يقع * 1116

(٢ ن) وهبتك لا هلك او لا بيك *

1103 ١١٠٣ ففي حالة الرضا لايقع الطلاق بشيء من الكنايات الا بالنية - و لو قال لم اعن به الطلاق كان القول قوله *

1104 ١١٠٤ و في حالة مذاكرة الطلاق يقع الطلاق بثمانية الفاظ - و لو قال لم انو الطلاق لا يصدق قضاء - وهي قوله انت خلية - برية - بتة - بائن - حرام اعتدي - امرك بيدك - اختاري *

1105 ١١٠٥ و في حالة الغضب يقع الطلاق بثلثة من هذه الثمانية - و اذا قال لم انو الطلاق لايصدق قضاء - و تلك الثلثة اعتدي - امرك بيدك - اختاري و في الخمسة الباقية من الثمانية عند ابي حنيفة رحمه الله تعالى اذا قال لم انو الطلاق لا يقع و يصدق قضاء - لانها تصلح للشتم فتحمل على الشتم في الغضب و الخصومة - و قال ابو يوسف رح اذا قال لم انو الطلاق لايصدق كما لايصدق في حالة مذاكرة الطلاق *

1106 ١١٠٦ وعن ابي يوسف رح في الاملاء انه الحق بهذه الخمسة اربعة اخرى لاملك لي عليك - لاسبيل عليك - خلت سبيلك - الحقي باهلك - لو قال ذلك في حال مذاكرة الطلاق او في الغضب و قال لم انو به الطلاق يصدق قضاء في قول ابي حنيفة (٢) رحمه الله تعالى - و قال ابو يوسف رح لايصدق *

1107 ١١٠٧ و فيما سوى ذلك من الكنايات نحو قولك حبلك على غاربك تقنعي - تخمري - استبرئي - قومي - اخرجي - اذهبي - انتقلي - انطلقي (٣) لانكاح لي عليك - و هبتك لاهلك قبل الدخول او لم يقبل لايقع الطلاق الا بالنية - و اذا قال لم انو الطلاق كان مصدقا *

(٢ ن) ابي حنيفة و محمد رحمهما الله تعالى * (٣ ن) انطلقي - تزوجي اغزلي - لا نكاح لي عليك *

١٠٩٤ رجل اشترى منكوحته لا يقع عليها الطلاق معلقا كان او منجزا ما 1094
دامت مملوكة له - و كذا لو كان آلى منها ثم اشتراها ثم انقضت مدة
الايلاء لا يقع عليها الطلاق - و لو اعتقها بعد ما اشتراها وقع طلاقه عليها
معلقا كان او منجزا *

١٠٩٥ و لو علق العبد طلاق امرأته الحرة بشرط لو قال لها انت طالق للسنة 1095
ثم ملكت المرأة زوجها فطلقها او وجد شرط الطلاق المعلق او جاء وقت
السنة يقع عليها الطلاق ما دامت في العدة *

١٠٩٦ رجل قال لامرأته انا منك طالق ونوى به الطلاق لا يقع - و لو قال انا 1096
منك بائن او انا عليك حرام و نوى به الطلاق يقع *

١٠٩٧ المرتد اذا لحق بدار الحرب فطلق امرأته لا يقع - فان عاد مسلما و هي 1097
في العدة يقع *

١٠٩٨ و المرتدة اذا لحقت بدار الحرب فطلقها زوجها ثم عادت الى دار الاسلام 1098
مسلمة قبل الحيض عند ابي حنيفة رحمه الله تعالى لا يقع طلاقه - و
عند صاحبيه رحمهما الله يقع - و الله اعلم *

فصل في الكنايات والمدلولات

١٠٩٩ الكناية ما تحتمل الطلاق ولا يكون الطلاق مذكورا نصا - و هي (٢) ثلثة 1099
اقسام - و الاحوال ثلثة *

١١٠٠ حالة مطلقة و هي حالة الرضا * 1100

١١٠١ و حالة مذاكرة الطلاق و هي ان تسأل المرأة طلاقها او يسأل غيرها طلاقها * 1101

١١٠٢ و حالة الغضب و الخصومة * 1102

(٢ ن) وهي اقسام ثلثة و احوال ثلثة *

١٠٩١ رجل قال لامرأته انت طالق في مكة و هما في غير مكة طلقت للحال 1091
و كذا لو قال انت طالق في ثوب كذا و هي في ثوب آخر يقع للحال *
و لو قال انت طالق في الليل و النهار طلقت واحدة - و لو قال انت
طالق في الليل و في النهار يقع ثنتان - و لو قال لامرأته في الليل
انت طالق في ليلك و نهارك طلقت للحال - و لو قال لامرأته في
الليل انت طالق في نهارك و ليلك طلقت غدا - و لو قال انت طالق
غدا اليوم طلقت غدا و يبطل ذكر اليوم - و لو قال انت طالق اليوم
غدا طلقت في الحال - و الاصل فيه انه اذا ذكر وقتين ليس بينهما
حرف العطف يقع الطلاق في الوقت المذكور اولا و يبطل ذكر الثاني *

١٠٩٢ و لو قال لها انت طالق اليوم و اذا جاء غد يقع للحال واحدة فاذا 1092
جاء غد و هي في العدة يقع[٢] اخرى *

١٠٩٣ رجل قال في شعبان انت طالق في رمضان تطلق حين تغرب الشمس 1093
من آخر يوم من شعبان - و لو قال انت طالق في غد تطلق[٣] حين يطلع
الفجر من الغد - و لو قال انت طالق في الصيف او في الشتاء او
في الربيع او في الخريف لا يقع الطلاق الا في الوقت المذكور - و
تكلموا في معرفة هذه الاوقات - قال بعضهم الصيف ما لا يحتاج فيه الى
الحشو والوقود - و الشتاء ما يحتاج فيه الى الحشو و الوقود - و الربيع
و الخريف ما يحتاج فيه الى الحشو لا الى الوقود - الا ان الربيع يكون
في آخر الشتاء - و الخريف يكون في آخر الصيف - و قال بعضهم
الصيف ما يكون فيه على الاشجار اوراق و ثمار - و الربيع ما يكون فيه
عليها الاوراق دون الثمار و كذا[٤] الخريف *

(٢ ن) طلقت اخرى * (٣ ن) طلقت حتى اذا * (٤ ن) فكذلك الخريف *

1085 ١٠٨٥ رجل قال له غيره هل لك[٢] امرأة الا طالق فقال لا طلقت امرأته و لو قال نعم لا تطلق - لان في المسئلة الاولى يكون[٣] قائلا ليست امرأتي الا طالقا و لو قال ذلك طلقت امرأته - و اما في المسئلة الثانية صار قائلا امراتي غير طالق - و لو قال كذلك لا تطلق *

1086 ١٠٨٦ رجل حكى يمين رجل ان دخلت الدار فامرأتي طالق فلما انتهى الحاكي الى ذكر الطلاق خطر بباله امرأته قالوا ان نوى عند ذكر الطلاق ترك الحكاية و استيناف الطلاق و كان كلامه يصلح ايقاعا للطلاق على امرأته يقع - و ان لم ينو الاستيناف لا يقع - و يكون كلامه محمولا على الحكاية *

1087 ١٠٨٧ رجل قال لامرأته انت طالق و سكت ثم قال ثلثا ان كان سكوته لانقطاع النفس تطلق[٤] ثلثا - و ان لم يكن لانقطاع النفس تقع واحدة - لان السكوت لانقطاع النفس لا يفصل *

1088 ١٠٨٨ رجل قال لامرأته انت طالق و سكت فقيل له كم فقال ثلثا قال ابو يوسف رح تطلق ثلثا - قالوا يحتمل ان هذا قول ابي يوسف رح خاصة - فان عنده اذا قال الرجل لامرأته انت طالق و نوى الثلث صحت نيته - و يحتمل ان هذا قول ابي حنيفة رحمه الله تعالى - فان عنده اذا طلق الرجل امرأته ثم قال جعلتها ثلثا يصير ثلثا *

1089 ١٠٨٩ رجل قال لامرأته انت طالق واحدة فقالت له هزار فقال هزار ينوي الايقاع فهو على ما نوى *

1090 ١٠٩٠ رجل قال لامرأته انت طالق ما لا يقع عليك او ما لا يجوز عليك طلقت واحدة - و كذا لو قال انت طالق ثلثا لا يقعن عليك او لا يجزن طلقت ثلثا *

(٢ ن) هل امرأتك الا طالق * (٣ ن) يصير قائلا * (٤ ن) طلقت ثلثا *

ولدها تطلق امرأته - و كذا لو اخذته ام امرأته و قالت لا ادعك تخرج الى السفر حتى تطلق ابنتي فقال دختر ترا سه طلاق و قال لم انو امرأتي طلقت امرأته قضاء *

1079 ١٠٧٩ رجل قال لامرأته في الغضب از تو زن مى سه طلاق و حذف الياء لا تطلق امرأته - لانه ما اضاف الطلاق اليها *

1080 ١٠٨٠ رجل بين يديه امرأة متلففة فقيل له هذه المتلففة امرأتك ثم قيل له احلف بثلث تطليقات ان لم تكن لك امرأة سوى هذه فحلف بثلث تطليقات ان ليست له امرأة سوى هذه و كانت المرأة المتلففة اجنبية اختلفوا فيه - و الفتوى على انه تطلق امرأته قضاء *

1081 ١٠٨١ و كذا لو تزوج امرأة ببلخ فذهبت المرأة بغير علمه الى ترمذ ثم حلف ان كانت له امرأة بترمذ فهي طالق طلقت امرأته *

1082 ١٠٨٢ رجل اكل خبزا و شرب خمرا ثم قال نان خوردم و نبيذ خوردم زنان ما بسه ثم قال له رجل بعد ما سكت بسه طلاق فقال الرجل بسه طلاق لا تطلق امرأته لانه لما فرغ عن الكلام و سكت ساعة كان هذا ابتداء كلام ليس فيه اضافة الى شيء *

1083 ١٠٨٣ رجل قال لمديونه امرأتك طالق ان لم تقض حقي اليوم فقال المديون ناعم و لم يرد به الجواب فقال له رب الدين قل نعم فقال نعم يريد به جوابه كانت اليمين لازمة - لانه اذا لم يتخلل بينهما شيء طويل و لم يأخذ في كلام آخر كان الكل كلاما واحدا *

1084 ١٠٨٤ رجل قال لغيره زن از تو بسه طلاق كه اين كار نكرده فقال بهزار طلاق يكون جوابا حتى لو لم يكن هذا الشخص فعل ذلك الامر لا يقع الطلاق *

فان كفت تستنكف عنها فارم بها فقال الزوج تف تف ورمي بالمزاق وقال رميت ونوى به الطلاق لا تطلق - لانه لوقاء ونوى به الطلاق لاتطلق فكذا اذا بزق و نوى به الطلاق *

1073 ١٠٧٣ رجل قال له غيره تزوجت امرأة اخرى فقال نعم فقال له لم طلقت الاولى فقال بالفارسية از براى تو و لم يكن تزوج امرأة اخرى ولا كان طلق الاولى و لم يرد به الطلاق لا تطلق امرأته *

1074 ١٠٧٤ امرأة قالت لزوجها طلقني ثلثا فقال الزوج اينك هزار طلاق لا تطلق امرأته لانه كلام محتمل *

1075 ١٠٧٥ رجل قال لامرأته لا تخرجي من الدار بغير اذني فاني حلفت بالطلاق فخرجت بغير اذنه لا تطلق لانه لم يذكر انه حلف بطلاقها و لعله حلف بطلاق غيرها فكان القول قوله *

1976 ١٠٧٦ رجل له اربع نسوة فقال لواحدة انت ثم انت للمرأة الاخرى ثم انت للمرأة الاخرى ثم انت طالق للرابعة طلقت الرابعة لانه جعل الطلاق نعتا للرابعة *

1077 ١٠٧٧ رجل قال طالق فقيل له من عنيت فقال امرأتي طلقت امرأته *

1078 ١٠٧٨ رجل قال امراة طالق او قال طلقت امراة ثلثا و قال لم اعن به امراتي يصدق - و لو قال عمرة طالق و امرأته عمرة و قال لم اعن به امراتي طلقت امرأته ولا يصدق قضاء - و كذا لو قال بنت فلان طالق ذكر اسم الاب و لم يذكر اسم المرأة و امرأته بنت فلان و قال لم اعن به امرأتي لا يصدق قضاء و تطلق امرأته كما لو ذكر اسم امرأته - و لو قال عمرة طالق و امرأته عمرة طلقت امرأته و لا يصدق قضاء في صرف الطلاق عنها - و كذا لو لم ينسبها الى ابيها و انما نسبها الى امها او الى

ذلك في حال مذاكرة الطلاق او في حالة الغضب يقع الطلاق - و ان لم يكن لا يقع الا بالنية[٢] كما لو قال بالعربية انت واحدة *

1068 ١٠٦٨ و لو قال اين زن كه مراست بسه قال ابو نصر الدبوسي رحمه الله لا يقع - و قال ابو بكر العياضي رح ان نوى الطلاق يكون طلاقا - و لو قال لامرأته انت بثلث قال الشيخ الامام ابو بكر محمد بن الفضل رحمه الله ان نوى يقع *

1069 ١٠٦٩ رجل قال لامرأته دست باز داشتمت بيک طلاق فقالت المرأة بازگوئي تا گواهان بشنوند فقال الزوج دست باز داشتمت بيک طلاق فلما افترقا قالت له اجنبية زن را دست باز داشتي فقال دست باز داشتمش بيک طلاق قالوا لو قال في المرة الثانية و الثالثة دست باز داشتم يكون انشاء فتطلق ثلثا الا اذا قال عنيب بالثانية و الثالثة الاخبار - و لو قال دست باز داشته ام يكون اخبار *

1070 ١٠٧٠ رجل قال لامرأته تو بسه طلاق باش ان نوى ايقاع الطلاق يكون طلاقا و الا فلا - لان هذا الكلام محتمل يحتمل انه اراد بذلك تو بسه طلاق ملك مني فلابد من النية - و كذا لو قال انت بثلث تطليقات يحتمل ذلك ايضا الا انه غلب استعماله في ايقاع الطلاق حتى لو ظهر ما يدل على انه اراد به الملك لا يقع *

1071 ١٠٧١ رجل قال لامرأته انت طالق كذا كذا طلقت ثلثا - لان كذا يستعمل في العدد و اقل العددين ليس بينهما حرف العطف احد عشر فتطلق ثلثا *

1072 ١٠٧٢ رجل قال لامرأته انا استنكف منك كالبزاق في الفم فقالت المراة

(٢ ن) الا بالنية *

١٠٥٨ و لو قال انت طالق واحدة مثل الثلث يقع واحدة بائنة * 1058

١٠٥٩ و لو قال انت طالق مثل الاساطين او مثل الجبال او مثل البحار 1059
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ابو يوسف رح يقع واحدة رجعية - وهذا الجنس يأتي في فصل التشبيه
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١٠٦٠ رجل قال لامرأته قبل الدخول بها انت طالق احدى و عشرين 1060
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او واحدة و الفا تقع واحدة في قولهم الا في رواية عن ابي يوسف رح
و لو قال احد عشر طلقت ثلثا - ولو قال واحدة و عشرة طلقت واحدة *

١٠٦١ رجل قال لامرأته المدخولة انت طالق فقالت لا اكتفي بواحدة فقال 1061
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١٠٦٤ و لو قال انت طالق مع كل تطليقة و كان ذلك بعد الدخول طلقت 1064
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قال مولانا رضي الله عنه ينبغي ان يكون الجواب على التفصيل - ان كان

يكون ذلك عرفهم يقع الطلاق *

١٠٥١ امرأة قالت لزوجها كيف لا تطلقني فقال الزوج تو خود سر تا پای طلاق کرده قالوا ان نوي الطلاق يقع و الا فلا - قال مولانا رضي الله عنه و ينبغي ان يقع الطلاق على كل حال - لان معنى كلامه انت بجميع اجزائك مطلقة و لو قال ذلك يقع الطلاق و ان لم ينو كما لو قال انت مطلقة * 1051

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1045 ١٠٤٥ امرأة قالت لزوجها طلقني فقالت لست لي بامرأة قالوا هذا جواب يقع به الطلاق ولا[٢] يحتاج الى النية *

1046 ١٠٤٦ امرأة قالت لزوجها طلقني فقال لها انت واحدة طلقت واحدة *

1047 ١٠٤٧ رجل طلق امرأته واحدة او ثنتين فدخلت عليه ام امرأته فقالت طلقتها و لم تحفظ حق ابيها و عاتبته في ذلک فقال الزوج هي ثانية لو قال الزوج هذه ثالثة يقع اخرى - و لو عاتبته و لم تذكر الطلاق فقال الزوج هذه المقالة لا تقع الزيادة الا بالبينة *

1048 ١٠٤٨ رجل قال لامرأته انت طال و نوى به الطلاق يقع الطلاق - و لو قال انت طاق لا يقع شيء و ان نوى - لان حذف اخر الكلام معتاد في العرب و قال الفقيه ابو القاسم رح لو ان عجميا قال ذلک بالفارسية و حذف حرف الآخر لا يقع و ان نوى - لانه غير معتاد في العجم - و لهذا لو قال لعبده تو آزا و لم يذكر الدال لا يعتق و ان نوى - قال الصدر الشهيد رحمه الله لا فرق بين العربية و الفارسية اذا نوى صحت نيته - و هذا كله اذا قال انت طال لا بكسر اللام - و ان قال بكسر اللام يقع الطلاق و ان لم ينو و يكون الاعراب قائما مقام الحرف - هذا اذا لم يكن في حال مذاكرة الطلاق ولا في حال الغضب - و ان كان ذلک في حال مذاكرة الطلاق او في حالة الغضب يقع الطلاق و ان لم ينو *

1049 ١٠٤٩ و لو قال انت طا و سكت او اخذ انسان فمه لا يقع الطلاق و ان نوى - لان العادة ما جرت بحذف حرفين من الكلام *

1050 ١٠٥٠ و لو قالت المرأة لزوجها طلقني فقال دائم ان كان ذلک في موضع

(٢ ب) فلا يحتاج *

في قول المسلمين او في القرآن او في قول فلان القاضي او فلان المفتي طلقت قضاء - و لا تطلق فيما بينه و بين الله تعالى ما لم ينو *

1038 ١٠٣٨ رجل طلق امرأته واحدة او ثنتين فنسي و لا يدري انه طلقها واحدة او ثنتين او ثلثا فقال وي مرا نشايد تا روى ديكري نه نبيند ثم زعم انه يحل له ان يتزوجها قالوا لا يصدق قضاء *

1039 ١٠٣٩ رجل قيل له ابن فلانه زن تو هست فقال هست ثم قيل له ابن زن تو سه طلاقه هست فقال هست و هو يزعم انه لم يسمع قوله سه طلاقه و انما سمع ابن زن تو هست قالوا لا يصدق قضاء *

1040 ١٠٤٠ رجل قال لامرأته قولي انا طالق لا يقع ما لم تقل - و لو قال لغيره قل(٢) لها انها طالق طلقت للحال *

1041 ١٠٤١ رجل قال لامرأته انت مني ثلثا ان نوى الطلاق طلقت ثلثا - و ان قال لم انو الطلاق ان كان ذلك في حال مذاكرة الطلاق لم يصدق قضاء و ان لم يكن في حال مذاكرة الطلاق قالوا نخشى ان لا يصدق قضاء *

1042 ١٠٤٢ امراة قالت لزوجها طلقني فاشار اليها بثلاثة اصابع و نوى به ثلث تطليقات لا تطلق ما لم يتلفظ به - و ذكر في كتاب الطلاق اذا قال لامرأته انت طالق و اشار اليها بثلث اصابع و نوى به الثلث و لم يذكر بلسانه فانها تطلق واحدة *

1043 ١٠٤٣ رجل رأى شخصا و ظن انها عمرة فقال يا عمرة انت طالق و لم يشر الى هذا الشخص فاذا الشخص غير عمرة و امرأته عمرة تطلق امرأته لان المعتبر عند عدم الاشارة هو الاسم و قد وجد *

1044 ١٠٤٤ رجل قال لامرأته چه طلاق كرده چه نى لا تطلق امرأته - و لو قيل لرجل

(٢ ن) قل لها انت طالق *

الى حالة البرسام فهو ماخوذ بذلك قضاء - و قال الفقيه ابو الليث رحمه الله كذلك اذا لم يكن اقراره بذلك في حال مذاكرة الطلاق *

1031 ١٠٣١ رجل قال لامرأته انت طالق كل يوم مرة و كل يومين مرتين يقع عليها في اليوم الاول واحدة و في اليوم الثاني ثلث ان كان الطلاق يزيد على الثلث *

1032 ١٠٣٢ رجل قال لامرأته طلقتك آخر تطليقات ذكر في المنتقى انها تطلق ثلثا - و لو قال انت طالق آخر تطليقات لا يقع الا واحدة *

1033 ١٠٣٣ رجل قال لامرأته انت طالق الى سنة يقع الطلاق بعد سنة في قول ابي حنيفة و محمد رحمهما الله تعالى *

1034 ١٠٣٤ رجل قال لامرأته في حال مذاكرة الطلاق هزار طلق بدامنت در كردم طلقت ثلثا - ولو قال ما نويت به ايقاع الطلاق كان القول قوله مع يمينه *

1035 ١٠٣٥ رجل وقعت الخصومة بينه و بين امرأته فقالت المرأة ضع ثلث تطليقات ههنا و هناك ثلث قصبات صغار كما[٢] يكون للحائك بلا غزل فاباذ الرجل باصبع رجله واحدة و قال هذا طلاقك ثم و ثم حتى نحاها عن اماكنها ثم قال ادفعيه الى الحائك لينسجه في ثوبك قالوا ينبغي ان لا تطلق امرأته لانه جعل القصت طلاقا *

1036 ١٠٣٦ رجل[٣] قال نساء العالم او نساء الدنيا طوالق لا تطلق امرأته - و لو قال نساء هذه البلدة او هذه القرية طوالق و فيها امرأته طلقت - و عن ابي يوسف رحمه الله لو قال نساء بغداد طوالق و فيها امرأته لا تطلق و قال[٤] محمد رح تطلق *

1037 ١٠٣٧ رجل قال لامرأته انت طالق في قول الفقهاء او في قول القضاة او

(٢ ن) مما يكون* (٣ ن) رجل قال لامرأته لنساء العالم * (٤ ن) عن محمد رح تطلق*

١٠٢٥ و كذا لو قال رجل لغيره اتريد ان اطلق امرأتك فقال خواهم او قال 1025
هلا بده فهو على هذين الوجهين *

١٠٢٦ رجل قال لغيره خواهى تا زنت را طلق كنم فقال الزوج خواهم فقال 1026
الرجل دادمش سه طلق قال بعض المشائخ لايقع شيئ في قول ابي حنيفة رح - و جعل هذا بمنزله ما لو قال لامرأته طلقي نفسك فقالت طلقت نفسي ثلثا لا يقع شيئ في قول ابي حنيفة رحمه الله ولو قال ذلك الرجل دادمش طلق يقع واحدة - و انما يصح هذا الجواب اذا اراد الزوج تفويض الطلاق اليه - اما اذا اراد به الرد لا يقع الطلاق *

١٠٢٧ رجل عرف انه كان مجنونا فقالت له امرأته طلقني البارحة فقال 1027
الزوج اصابني الجنون ولا يعرف ذلك الا بقوله كان القول قوله *

١٠٢٨ و طلاق المعتوه غير واقع كطلاق المجنون * 1028

١٠٢٩ وتكلموا في الفاصل بين المعتوه و المجنون قالوا المجنون من لا يستقيم 1029
كلامه و افعاله الا نادرا - والعاقل ضده - والمعتوه من يختلط كلامه و افعاله فيكون ذلك غالبا و هذا غالبا فكانا سواء - و قال بعضهم المجنون من يفعل الافعال القبيحة عن قصد - و العاقل من يفعل ما يفعله المجانين في الجانين لكن لا عن قصد و انما يفعل عن ظن الصلاح - و المعتوه من يفعل ما يفعل المجانين في الجانين لكن عن قصد يفعل ذلك مع ظهور وجه الفساد *

١٠٣٠ رجل طلق امرأته و هو صاحب برسام فلما صح قال قد طلقت امرأتي 1030
ثم قال اني كنت اظن ان الطلاق في تلك الحالة كان واقعا قال مشائخنا رح حين ما اقر بالطلاق ان رده الى حالة البرسام و قال قد طلقت امرأتي في حالة البرسام فالطلاق غير واقع - و ان لم يرد

1018 رجل طلق امرأته تطليقتين ثم تزوجها و لوفاها مهرها و اخرجها من منزله فقال له رجل لم لا تعيدها الى منزلك و هي بعد امرأتك بتطليقة فقال الزوج لو طلق خود شده است و اين طلق ديكر شد قال الشيخ الامام هذا رحمه الله ان اراد به الايقاع يقع - و ان اراد به الاخبار فهي امرأته فيما بينه و بين الله تعالى - و في القضاء يقع اخرى *

1019 رجل قال لامرأته انت طالق اكثر من واحدة و اقل من ثنتين قال الشيخ الامام هذا رح القياس ان يقع ثنتان - لكن ذكر في اختلاف العلماء انه يقع الثلث *

1020 رجل قال لاحدى امرأتي طالق وليس له الا امرأة واحدة طلقت امرأته *

1021 رجل قال لامرأته انت طالق انت طالق انت طالق و قال عنيت بالاولى الطلاق و بالثانية و الثالثة افهامهما صدق ديانة - و في القضاء طلقت ثلثا *

1022 رجل قال لامرأته انت طالق و قال عنيت به الطلاق عن الوثاق صدق ديانة لا قضاء - و لو قال ما عنيت به الطلاق عن النكاح لا يصدق اصلا - و ان صدقته المرأة في ذلك لا يلتفت الى تصديقها - و لو قال انت طالق من عمل كذا طلقت قضاء *

1023 رجل قال له غيره الك امرأة غيرهذه فاجاب و قال كل امرأة لي طالق ذكر في النوازل انه لا تطلق امرأته *

1024 امرأة قالت لزوجها اتريد ان اطلق نفسي فقال الزوج نعم فقالت المرأة طلقت نفسي قال الفقيه ابو جعفر رح قوله نعم يحتمل الرد يعني طلقي ان استطعت و يحتمل التفويض فاي شيء نوى صحت نيته *

طلاق طلقت ثلثا ان كان ذلك بعد الدخول *

1008 ۱۰۰۸ و لو قال ترايک طلاق و سکت ثم قال و دو طلاق طلقت ثلثا - و لو قال دو طلاق بغير حرف العطف ان نوى العطف طلقت ثلثا و ان لم ينو لا يقع الا واحدة *

1009 ۱۰۰۹ رجل قال لامرأته تراسه ذكر في النوازل انها لا تطلق - و قال الصدر الشهيد رح عندي انها تطلق *

1010 ۱۰۱۰ قال لامرأته (۲) انت واحدة و نوى به الطلاق يقع واحدة اعرب الواحدة او لم يعرف *

1011 ۱۰۱۱ ولو قال لامرأته نويسه في حال مذاكرة الطلاق او الغضب طلقت ثلثا *

1012 ۱۰۱۲ و لو قال لها في غضب او خصومة اي هزار طلاقه برو طلقت ثلثا - و كذا لو قال اي سه طلاقه - و لو قال اي طلاق داده يقع واحدة *

1013 ۱۰۱۳ و اذا جرت الخصومة بينها و بين زوجها فقامت لتخرج فقال الزوج سه طلاق با خويشتن ببر قال الشيخ الامام ابو بكر محمد بن الفضل رح ان لن نوى الايقاع يقع - فان لم يكن له نية فكذلك لانه ايقاع ظاهرا -

1014 ۱۰۱۴ قالت المرأة لزوجها مرا مدار فقال الزوج نا داشته گير و نوى الطلاق طلقت *

1015 ۱۰۱۵ و لو قال مراسه طلاق ده فقال الزوج گفته گير قال الشيخ الامام هذا لا يقع الطلاق و ان نوى *

1016 ۱۰۱۶ ولو قال لامرأته تراسه طلاق دادستند لا يقع لانه ذكر الايقاع دون الوقوع *

1017 ۱۰۱۷ رجل طلق امرأته فقيل له آشتي نميكني فقال مرا نمي شايد لا يكون اقرارا بالثلث *

(۲ ن) رجل قال لامرأته *

العتاق يقع الطلاق و العتاق في قول محمد رح - و قال ابو يوسف رح لا يقع الطلاق بينه و بين الله تعالى و يقع العتق - و هو ابي حنيفة رحمه الله تعالى على عكس هذا يقع الطلاق و لا يقع العتاق - و الظاهر من قول ابي حنيفة رح وقوع الطلاق و العتاق كما قال محمد رحمه الله - و لو جرى على لسانه كلمة كفر لا يكفر بلا خلاف *

1000 رجل قال لامرأته انت طالق لوتين طلقت ثنتين - و لو قال انت طالق ثلثة الوان طلقت ثلثا *

1001 اذا قال لامرأته انت طالق انت لو قال انت طالق و انت قال ابو يوسف رح يقع واحدة و قال محمد رح يقع ثنتان - و لو قال ذلك لامرأتين فقال انت طالق انت للمرأة الاخرى لو قال فانت لو قال و انت يقع الطلاق عليهما *

1002 امرأة قالت لزوجها طلقني فابى فقالت داديي فقال دادم ان كان في قوله دادم ادنى تثقيل لا يقع الطلاق *

1003 رجل قال لامرأته اذهبي الف مرة ينوي الطلاق طلقت ثلثا *

1004 و لو قال لامرأته المدخول بها انت طالق انف طالق يقع ثنتان - و ان نوى التكرار صدق ديانة لا قضاء - و لو قال ذلك لغير المدخول بها تقع واحدة *

1005 و لو قال لغير المدخول بها انت طالق واحدة لا بل ثنتين طلقت واحدة *

1006 رجل قال لامرأته ثرا طلق او قال طالق ترا نهي طالق ولا فرق بين التقديم و التاخير *

1007 و لو قال بالفارسية دادمت يک طلاق و سكت ثم قال دو طلاق و سه

كان لا يعلم ان هذا طلاق او عتاق الا ان الرجل لقن ان يقول طلقت امرأتي او امرأتي طالق فقال ذلك فكذلك الجواب يقع الطلاق و العتاق و ان باع بالعربية و هو لا يعرف معنى اللفظ لا يصح البيع و الشراء - و لو لقنت المرأة ان تقول ابرأت زوجي من المهر فقالت ذلك لا يبرأ الزوج عن المهر - و سيأتي جنس هذا في فصل الخلع ان شاء الله تعالى *

٩٩٧ و لو قال لامرأته انت طالق ان شاء الله و هو لا يعرف معنى قوله ان 997
شاء الله لا يقع الطلاق - لان الطلاق مع الاستثناء باطل - و علم المرء و جهله فيه سواء - قالوا هذا كسكوت البكر لما جعل رضا شرعا ولا يفرق بين العلم و الجهل - و هذا الجواب ظاهر فيما اذا علم ان الاستثناء اذا اقترن بالطلاق يبطل الطلاق و لو لم يعلم ذلك فكذلك الجواب - و ان كان يعرف ذلك و قصد ايقاع الطلاق فجرى الاستثناء على لسانه من غير قصده لا يقع الطلاق ايضا - و روي عن شداد بن حكيم انه قال اختلفت انا و خلف بن ايوب في هذه المسئلة فقلت الاستثناء صحيح و الطلاق باطل و قال خلف رح الاستثناء باطل و الطلاق واقع قال خلف رحمه الله فرأيت ابا يوسف رح في المنام فقلت له اختلفت انا و شداد في المسئلة فقال لي ابو يوسف رح سل نفسك فقال يصح الاستثناء فقلت له لم قال ارأيت لو قال لها انت طالق فجرى على لسانه او غير طالق اكان يقع الطلاق قلت لا قال فهذه كذلك *

٩٩٨ و روى هشام عن محمد رحمه الله رجل اراد ان يقول لله علي صوم يوم 998
فجرى على لسانه صوم شهر قال محمد رحمه الله عليه صوم شهر *

٩٩٩ و لو اراد ان يقول شيئا فجرى على لسانه النذر او الطلاق او العتاق قال الفقيه 999
ابو جعفر رح في النذر يلزمه المنذور به بلا خلاف - و في الطلاق و

٩٩٤ ولو قال لامرأته ترا طلاق او قال دادمت طلاق و نوى الثلث صحت نيته * 994

٩٩٥ رجل قال لامرأته ترا تلاق فهذه خمسة الفاظ - احدها هذه و الثانية ترا 995
طلاغ و الثالثة ترا تلاک و الرابعة طلاك و الخامسة ترا تلاغ - نقل عن
الشيخ الامام ابي‌بكر محمد بن الفضل رح انه يميز بين العالم و الجاهل
فقال اذا كان عالما لا يقع - و ان كان جاهلا يقع - ثم رجع و قال يقع
الطلاق في هذه المسائل كلها ولا يفرق بين العالم و الجاهل - لان العوام
يزعمون الكل طلاقا ولا يميزون و من الناس من لا يحسن الكلام و قد
يقصد الطلاق و يجري على لسانه ذلک في الغضب و الخصومة - قيل
له فان كان الرجل عربيا قال و ان كان عربيا فكذلک - لان من العرب
من يذكر الكاف مكان القاف - فان قال تعمدت بذلک كيلا يقع الطلاق
لا يصدق قضاء - و يصدق فيما بينه و بين الله تعالى الا ان يشهد قبل
التلفظ فيقول للشهود ان امرأتي تطلب مني الطلاق و انا لا اريد فانا
اتلفظ بهذا اقطعا لخصومتها ثم تلفظ بذلک و يسمع الشهود ذلک فان
شهدوا ذلک عند القاضي فح لا يقضي القاضي بالطلاق - و عن الشيخ
الامام هذا قال استفتيت عن تركي قال لامرأته ترا تلاق و في التركية
يقال للحلال تلاق و قال الزوج اردت الحلال و ما اردت به الطلاق
فقلت يقع الطلاق ولا يصدق في القضاء - لان هذا مما يجري على
لسان الناس خصوصا في الغضب و الخصومة فيكون الطلاق واقعا ظاهرا
ولا يصدق قضاء *

٩٩٦ رجل طلق امرأته او اعتق عبده او دبر بالعربية و هو لا يعلم ان كان 996
يعلم ان هذا ايقاع الطلاق و العتاق و لكن لا يعرف معنى اللفظ يقع
الطلاق و العتاق و يصح التدبير و ان كان لا يعرف معنى اللفظ - و ان

٩٨٦ رجل قال لامرأته في غضب او خصومة اي هزار طالقه برو طلقت ثلثا - 986
و كذا لو قال اي طلاق داده طلقت - ولو قال اي بسه طالقه طلقت ثلثا *

٩٨٧ و لو قال لها بالعربية اذهبي الف مرة ينوي الطلاق طلقت ثلثا * 987

٩٨٨ رجل طلق امرأته بعد الدخول واحدة ثم قال بعد ذلك جعلت تلك 988
التطليقة بائنة او جعلتها ثلثا اختلفت الروايات فيه - و الصحيح ان
على قول ابي حنيفة رحمه الله يصير بائنا و ثلثا - و على قول محمد
رح لا يصير بائنا ولا ثلثا - و على قول ابي يوسف رح يصح جعلها بائنا
لا يصح جعلها ثلثا *

٩٨٩ و لو طلق امرأة بعد الدخول بها واحدة ثم قال في العدة الزمت 989
امرأتي ثلث تطليقات بتلك التطليقة او قال الزمتها تطليقتين بتلك
التطليقة فهو على ما قال - و ان قال الزمتها ثلثا فهو ثلث - و ان قال
الزمتها تطليقتين فهو ثنتان *

٩٩٠ و لو طلقها واحدة ثم راجعها ثم قال جعلت تلك التطليقة بائنة لا تصير 990
بائنة - لانه لا يملك ابطال الرجعة *

٩٩١ و لو قال لها بعد الدخول اذا طلقتك واحدة فهي بائن او هي ثلث 991
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قبل نزول الطلاق *

٩٩٢ و لو قال لها اذا دخلت الدار فانت طالق ثم قال جعلت هذه التطليقة 992
بائنة - او قال جعلتها ثلثا قال هذه المقالة قبل دخول الدار لا تلزمه
لان التطليقة لم تقع عليها *

٩٩٣ اذا قال لامرأته بعدالدخول ترايک طلاق ترايک طلاق ترايک طلاق يقع الثلث 993
كما لو قال لها بالعربية انت طالق انت طالق انت طالق فانه يقع الثلث *

٩٧٨ و لو كان له امرأتان اسم كل واحدة منهما زينب واحدهما صحيحة 978
النكاح و الاخرى فاسدة النكاح فقال زينب طالق طلقت صحيحة النكاح
فان قال عنيت به الاخرى لا يصدق قضاء - كما لو قال زينب طالق
و امرأته زينب طلقت امرأته - فان قال عنيت زينب اجنبية
لا يصدق قضاء - و كذا لو قال لاحدى امرأتي طالق طلقت صحيحة النكاح *

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طلقت صحيحة النكاح - كما لو جمع بين منكوحة و اجنبية فقال
طلقت احدنكما طلقت منكوحته *

٩٨٠ النائم اذا طلق امرأته فاخبر بذلك بعد الانتباه فقال اجزت ذلك 980
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٩٨٢ و لو قال النائم بعد الانتباه اوقعت ذلك الطلاق لو قال جعلت ذلك 982
الطلاق طلقتا يقع الطلاق - و كذا الصبي اذا قال ذلك بعد البلوغ *

٩٨٣ رجل له امرأتان فقال لاحدهما انت طالق اربعا فقالت الثلث 983
يكفيني فقال الزوج اوقعت الزيادة على فلانة لا يقع على (٢) فلانة شيء
و كذا لو قال الزوج الثلث لك و الباقي لصاحبتك لا تطلق الاخرى *

٩٨٤ رجل قال لامرأته انت طالق واحدة او ثنتين يقع واحدة و لا يخير * 984

٩٨٥ رجل قال لامرأته قد طلقك الله او قال لعبده اعتقك الله ذكر 985
في الواقعات انه يقع نوى او لم ينو - و ذكر في العيون و البقالي ان
نوى يقع و الا فلا - الا اذا سأله الغير و قال طلقت امرأتك فقال طلقها
الله فانه يقع - و كذا العتق *

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(٢) على الاخرى *

لو صدرك او فخذك او رجلك او يدك او دبرك و ما اشبه ذلك لا يقع الطلاق - ولو قال هذا الراس طالق و اشار الى راس امرأته الصحيح انه يقع كما لو قال راسك هذا طالق - ولهذا لو قال لغيره بعت منك هذا الرأس بالف درهم و اشار الى راس عبده فقال المشتري قبلت جاز البيع *

٩٧٤ رجل قال لغيره اخبر امرأتي بطلاقها او بشرها بطلاقها او احمل اليها طلاقها او اخبرها انها طالق او قل لها انها طالق طلقت للحال - و لا يتوقف على وصول الخبر اليها و لا على قول المامور ذلك - و لو قال قل لها انت طالق لا يقع الطلاق ما لم يقل لها المامور ذلك * 974

٩٧٥ و لو قال اكتب لها طلاقها ينبغي ان يقع الطلاق للحال كما لو قال احمل اليها طلاقها و كما لو قال اكتب الى امرأتي انها طالق * 975

٩٧٦ رجل قال لامرأته انت طالق مثل سنجة دانق يقع واحدة - و لو قال مثل سنجة دانق و نصف يقع تطليقتان - وكذا لو قال مثل درهمين يقع واحدة - و لو قال مثل ثلث دراهم يقع طلاقان - فالحاصل(٢) انه اذا شبه الطلاق بما يوزن بسنجة واحدة يقع واحدة - و ان شبه بما يوزن بسنجتين يقع تطليقتان - و ان شبه بما يوزن بثلث سنجات او اكثر يقع الثلث - فالدانق يوزن بسنجة واحدة و كذلك الدرهمان - و دانق و نصف دانق يوزن بسنجتين و كذا ثلثة دراهم - فعلى هذا يخرج هذا الجنس من المسائل * 976

٩٧٧ اذا جمع بين امرأتين احدهما صحيحة النكاح و الاخرى فاسدة النكاح فقال احدكما طالق لا تطلق صحيحة النكاح - كما لو جمع بين منكوحة و اجنبية و قال احدكما طالق * 977

(٢ ن) و الحاصل *

۹۶۷ و لو قالت دست از من بازدار فقال الزوج باز داشتم کیر فکذلک ان 967
نوی الیقاع یقع و الا فلا *

۹۶۸ و لو قال لامرأته في غير مذاكرة الطلاق راست برو هزار بار طلاق داده 968
ثم قال لم ارد طلاقها کان القول قوله *

۹۶۹ و لو قال لامرأته لست لي بامرأة او قال ما انت لي بامرأة او قال 969
ما انا بزوج لک قال ابو حنيفة رحمه الله تعالى ان نوى وقوع الطلاق يقع
و الا فلا - و قال صاحباه لا يقع و ان نوى *

۹۷۰ ولو قيل له هل لک امرأة فقال لا ذكر بعض المشائخ رح انه لا يقع الطلاق 970
في قولهم - و ذكر الكرخي رح انه على هذا الخلاف ايضا *

۹۷۱ و لو قال والله ما انت لي بامرأة او قال على حجة ان كنت لي 971
بامرأة او قال ما كنت لي بامرأة او قال لم اكن تزوجتک لا يقع الطلاق
و ان نوى *

۹۷۲ رجل قال کل امرأة لي طالق او قال امرأتي طالق لا تدخل فيه المعتدة 972
عن البائن - و لو قال لها انت طالق يقع - و كذا لو قال للمختلعة ابن زن
من بسه طلاق يقع الثلث *

۹۷۳ رجل اضاف الطلاق الى بعض المرأة ان اضاف الى جزء شائع نحو 973
ان يقول نصفک طالق او ثلثک او ربعک طالق او جزء من الف جزء
منک يقع الطلاق - وكذا لو اضاف الى بعض جامع نحو ان يقول رأسک
طالق او فرجک طالق او رقبتک طالق او وجهک او روحک طالق او
جسدک يقع الطلاق - و لو قال دمک طالق فيه روايتان - و لو قال بطنک
او ظهرک قال الشيخ الامام شمس الائمة السرخسي رح عندي لا يقع
الطلاق - و ان اضاف الى جزء معين غير جامع نحو ان يقول شعرک طالق

قبل انصلاخ ذي الحجة من هذه السنة طلقتك *

٩٦٣ رجل طلق امرأته ثم قال لها في العدة قد طلقتك او قال بالفارسية ترا 963
طلاق دادم يقع تطليقة اخرى - و لو قال قد كنت طلقتك او قال
بالفارسية طلاق داده ام ترا لا يقع اخرى *

٩٦٤ رجل قال لامرأته انت طالق اولا لا يقع الطلاق في قولهم - و لو قال انت 964
طالق ثلثا اولا او قال انت طالق واحدة اولا او قال او لا شيء يقع واحدة
في قول محمد و ابي يوسف الاول - ثم رجع ابو يوسف رح و قال
لا يقع شيء - و لو قال انت طالق اولا شيء روى ابو سليمان رحمه الله
انه لا يقع - و لم يذكر فيه خلافا و ذكر في رواية ابي حفص ان على قول
محمد رح يقع واحدة و على قول ابي يوسف رح لا يقع شيء *

٩٦٥ امرأة قالت لزوجها مرا طلق دء فقال الزوج داده كير او قال كرده كير 965
او قال داده باد او قال كرده باد اختلف المشائخ فيه - و الصحيح انه
ينوي ان نوى الايقاع يقع واحدة رجعية - و ان لم ينو لا يقع شيء
و لو قال الزوج داده إست او قال كرده است او قال داده شده است او
قال كرده شده است يقع واحدة رجعية نوى او لم ينو - و ان قال
ما نويت به طلاقا لا يصدق قضاء - و لو قال الزوج داده انكار او قال
كرده إنكار لا يقع الطلاق و ان نوى - كانه قال لها بالعربية احسبي انك
طالق و ان (٢) قال ذلك لا يقع و ان نوى - و لو قال لها كوني طالقا او
اطلقي يقع الطلاق *

٩٦٦ ولو قالت المرأة لزوجها مرا مدار فقال الزوج نا داشته كير قالوا ان نوى 966
الايقاع يقع و الا فلا *

(٢ ن) و لو *

لو قال فلانة طالق ثلثا ثم قال اشركت فلانة معها طلقت كل واحدة ثلثا *

٩٥٧ و لو قال لنسائه الاربع بينكن تطليقة طلقت كل واحدة تطليقة - و كذا 957
لو قال بينكن تطليقات او قال ثلث لو اربع الا ان ينوي قسمة كل واحدة
بينهن فتطلق كل واحدة ثلثا *

٩٥٨ و لو قال بينكن خمس تطليقات يقع على كل واحدة طلقان هكذا الى 958
ثماني تطليقات - فان زاد على الثمان طلقت كل واحدة ثلثا *

٩٥٩ و كذا لو قال اشركتكن في تطليقة فهذا و ما لو قال بينكن تطليقة سواء * 959

٩٦٠ رجل قال كنت طلقت امرأتي او كنت طلقت احدى نسائي او 960
قال كنت طلقت امرأة لي يقال لها زينب او كنت طلقت زينب
و زينب للحال امرأته يقع الطلاق على امرأته للحال - و لا يصدق في صرف
الطلاق الى غيرها ولا في الاسناد - و لو قال طلقت اول امرأة تزوجتها
او قال طلقت امرأة كانت لي او قال كانت لي امرأة فاشهدوا انها
طالق طلقت امرأته للحال في هذه المسائل الا ان يقر بطلاق ماض في
نكاح ماض نحو ان يقول كنت طلقت امرأة كانت لي او قال كانت
لي امرأة فطلقتها او قال كنت طلقت اول امرأة تزوجتها او قال كنت
طلقت امرأة كانت لي يقال لها زينب او قال كنت طلقت امرأة
تزوجتها لا يقع الطلاق على التي تكون في نكاحه في هذه المسائل
اذا قال عنيت غيرها *

٩٦١ رجل قال لامرأته انت طالق كل سنة ثلثا يقع الثلث من ساعته 961
و كذا لو قال لامرأته يوم الخميس انت طالق يوم الخميس او قال
انت طالق في يوم الخميس يقع الطلاق عليها للحال *

٩٦٢ رجل قال لامرأته بالفارسية اگر امسال زن خواهم فهي طالق فتزوج امرأة 962

الشتم دين فيما بينه و بين الله تعالى لا فى القضاء *

947 ٩٤٧ و لو قال لها انت مطلقة بالتخفيف او قال اطلقتك ان نوى به الطلاق يقع و الا فلا *

948 ٩٤٨ و اذا قال لامرأته اعرتك طلاقك عن ابي يوسف رحمه الله انها تطلق كما لو قال اقرضتك طلاقك - و عن محمد رح انه لا يقـــع - و عن ابي حنيفة رحمه الله فيها روايتان *

949 ٩٤٩ و اختلف المشائخ رح في قوله رهنتك طلاقك و الصحيح انه لا يقع *

950 ٩٥٠ و لو قال خليت طلاقك او قال خليت سبيل طلاقك او قال تركت طلاقك ان نوى وقوع الطلاق يقع و الا فلا - لو قال برئت من طلاقك اختلف فيه المشائخ و الصحيح انه لا يقع *

951 ٩٥١ و لو قال اعرضت عن طلاقك لا يقع الطلاق *

952 ٩٥٢ و لو جمع بين منكوحته و رجل و قال احدكما طالق لا يقع الطلاق على امرأته في قول ابي حنيفة رضي الله عنه - و عن ابي يوسف رحمه الله انه يقع *

953 ٩٥٣ و لو جمع بين امرأته و اجنبية فقال طلقت احدكما طلقت امرأته و لو قال احداكما طالق و لم ينو شيئا لا تطلق امرأته و عن ابي يوسف و محمد رح انها تطلق *

954 ٩٥٤ و لو جمع بين امرأته و ما ليس بمحل للطلاق كالبهيمة و الحجر و قال احدكما طالق طلقت امرأته في قول ابي حنيفة و ابي يوسف رضي الله عنهما - و قال محمد رح لا تطلق *

955 ٩٥٥ و لو جمع بين امرأته الحية و الميتة و قال احداكما طالق لا تطلق الحية *

956 ٩٥٦ و لو قال فلانة طالق ثلثة و فلانة معها لامرأة له اخرى طلقتا ثلثا - و كذا

942 ٩٤٢ و لو قال لامرأته بعيبها بازدادمت و نوى به الطلاق يقع - و لو قال بعيب بازدادم لا يقع *

943 ٩٤٣ قال لها ثلث تطليقات عليك طلقت ثلثا - و كذا لو قال لعبده العتاق عليك يعتق *

944 ٩٤٤ و لو قال لرجل عليك هذا العبد بالف فقال قبلت يكون بيعا و لو قال لها طلاقك علي ذكر في الاصل على وجه الاستشهاد فقال الا ترى انه لو قال لله علي طلاق امرأتي لا يلزمه شيء *

945 ٩٤٥ و هذه مسائل اختلفوا فيها - رجل قال لامرأته طلاقك علي واجب لو لازم او ثابت او فرض قال بعضهم يقع في الكل تطليقة رجعية ان كان دخل بها نوى او لم ينو - و قال بعضهم لا يقع و ان نوى - و بعضهم تكروا فيه خلافا - فقالوا عند ابي حنيفة رحمه الله تعالى يقع في الكل - و عند محمد رحمه الله في قوله لازم يقع - و عند ابي يوسف رح ينوي في الكل - و ذكر الصدر الشهيد في كتاب الايمان من شرح المختصر الصحيح انه لا يقع الطلاق في الكل عند ابي حنيفة رحمه الله تعالى و ذكر هو في واقعاته الصحيح انه يقع الطلاق في الكل - و قال الفقيه ابو جعفر رح في قوله واجب يقع لتعارف الناس - و في قوله ثابت او فرض او لازم لا يقع لعدم التعارف *

946 ٩٤٦ رجل قال لامرأته يا مطلقة ان لم يكن لها زوج قبله لو كان لها زوج لكن مات ذلك الزوج و لم يطلق يقع الطلاق عليها - و ان كان لها زوج قبله و قد كان طلقها ذلك الزوج ان لم ينو بكلامه الاخبار طلقت - و ان قال عنيت به الاخبار دين فيما بينه و بين الله تعالى - و هل يدين في القضاء اختلفت الروايات فيه و الصحيح انه يدين - و لو قال نويت به

تخلصتفي منها لو قال في اعتاق العبد احسنت تقبل الله منك كان اجازة *

٩٣٣ رجل قال لامرأته انت طالق بعدد شعر ابليس يقع واحدة * 933

٩٣٤ و لو قال بعدد الشعر الذي على فرجك و قد كان طلت و ليس عليه 934
شعر قال محمد رح لا يقع كما لو قال بعدد الشعر الذي على ظهر كفي
و قد طلي *

٩٣٥ و لو قال بعدد الشعر الذي في بطن كفي فانه يقع و يلغو ذكر الشعر - لان 935
بطن الكف ليس موضع الشعر بخلاف ظهر الكف *

٩٣٦ رجل قال لامرأته ثلث تطليقات عليك طلقت ثلثا * 936

٩٣٧ و لو قال لامرأته انت طالق واحدة فقالت المرأة خواهي هزار فقال الزوج 937
هزار و لم ينو شيئا قالوا هذا الى الوقوع اقرب *

٩٣٨ رجل قال لامرأته هزار طلق تو يكي كردم قالوا يقع الثلث كانه قال طلقتك 938
ثلثا بدفعة واحدة - و لو قال هزرمان هزار طلق تو يكي كنم و اراد به ايقاع
الطلاق قالوا طلقت ثلثا - و لو قال مرترا هزار طلق دانستند لا يكون طلاقا *

٩٣٩ و لو قال لها تراسه طلاق يقع الثلث كانه قال اعطيتك ثلث تطليقات * 939

٩٤٠ و لو قال لها من طلاق ترا دادم ان نوى الايقاع يقع - و ان نوى التفويض 940
لا يقع - و ان لم ينو التفويض يكون ايقاعا *

٩٤١ و لو قال لها لك الطلاق قال ابوحنيفة رضي الله عنه ان عنى به التفويض 941
يدين - و اذا قامت عن مجلسها بطل - و ان لم ينو شيئا لا رواية فيه
عن ابي حنيفة رضي الله تعالى عنه - و ينبغي ان يقع الطلاق - و هكذا
روي عن ابي يوسف رحمه الله - و لو قال اليك الطلاق فهو على
التفويض في قولهم *

و قال الفقيه ابو النصر محمد بن سلام رح يقع ثلث - و الاظهر ما قال الفقيه ابو جعفر رحمه الله *

923 ٩٢٣ و لو قال انت طالق عددا ذكر ابن سماعة رحمه الله انه يقع ثنتان *

924 ٩٢٤ ولو قال انت طالق حتى يستكمل ثلث تطليقات ذكر بشير بن الوليد رح انه يقع ثلث و ان نوى غيره ايديين في القضاء *

925 ٩٢٥ و لو قال انت طالق كل التطليقة طلقت واحدة - و لو قال انت طالق كل تطليقة طلقت ثلثا دخل بها او لم يدخل *

926 ٩٢٦ و كذا لو قال انت طالق بعد كل تطليقة او مع كل تطليقه او قال انت مع كل تطليقة طالق طلقت ثلثا *

927 ٩٢٧ و لو قال لامرأته انت طالق مع كل امرأة لي و له اربع نسوة طلقن جميعا فان نوى في هذه المسائل بعض النساء و بعض الطلاق لا يصدق قضاء و يصدق فيما بينه و بين الله تعالى *

928 ٩٢٨ و لو قال انت طالق ثلثة انصاف تطليقة يقع ثنتان - و لو قال ثلثة انصاف تطليقتين يقع الثلث *

929 ٩٢٩ و لو قال انت طالق نصفي تطليقة فهي واحدة *

930 ٩٣٠ و لو قال انت طالق نصف تطليقة و ثلث تطليقة و ربع تطليقة فهي ثلث - و لو قال نصف تطليقة و ربعها و سدسها فهي واحدة *

931 ٩٣١ رجل قيل له ان فلانا طلق امرأتك او اعتق عبدك فقال نعم ما صنع او بئس ما صنع اختلفوا فيه - قال الشيخ الامام الاجل ابو بكر محمد بن الفضل رح لا يقع الطلاق فيها *

932 ٩٣٢ رجل قال لغيره طلقت امرأتك فقال احسنت او قال اسأت على وجه الانكار لا يكون اجازة - و لو قال احسنت يرحمك الله حيث

لم تكن امرأته بطل - لانه اخرج الطلاق جوابا لكلام التي اجابت - و ان قال نويت زينب طلقت زينب - و لو قال يا زينب انت طالق فلم تجبه احد طلقت زينب *

915 ٩١٥ و لو قال لامرأة ينظر اليها و يشير اليها يا زينب انت طالق فاذا هي امرأة له اخرى اسمها عمرة يقع الطلاق على عمرة يعتبر الاشارة و يبطل التسمية *

916 ٩١٦ رجل قال لامرأته و قد دخل بها اذا طلقتك فانت طالق ثم طلقها يقع عليها طلاقان - وكذا لو قال ان طلقتك او متى طلقتك او متى ما طلقتك *

917 ٩١٧ و كذا لو قال كلما طلقتك فانت طالق ثم طلقها واحدة يقع عليها طلاقان *

918 ٩١٨ ولو قال كلما يقع عليك طلاقي فانت طالق ثم طلقها واحدة طلقت ثلاثا *

919 ٩١٩ رجل قال لامرأته المدخولة بها انت طالق انت طالق يقع عليها طلاقان - و لا يصدق قضاء ان قال نويت بالثانية الخبر - و كذا لو قال قد طلقتك قد طلقتك او قال انت طالق قد طلقتك يقع طلاقان *

920 ٩٢٠ و لو قال انت طالق فقال له رجل او امرأة ماذا قلت فقال قد طلقتها او قلت هي طالق يقع واحدة فى القضاء و فيما بينه و بين الله تعالى *

921 ٩٢١ رجل قال لامرأته انت طالق عامة الطلاق او جل(٢) الطلاق يقع طلاقان - و لو قال انت طالق كل الطلاق يقع الثلث *

922 ٩٢٢ و لو قال انت طالق اكثر الطلاق ذكر فى الاصل انه يقع ثلث - و لو قال اقل الطلاق يقع واحدة - و لو قال انت طالق لا قليل و لا كثير اختلف فيه الاقاويل لاختلاف الروايات - قال الفقيه ابو جعفر رحمه الله يقع طلاقان - و قال الشيخ الامام بو بكر محمد بن الفضل رح يقع واحدة

(٢ س) او كل الطلاق *

بائنا - و لو قال اردت واحدة منهما لا يصدق - و كذا لو قال امرأتي طالق و امرأتي طالق - و كذلك العتق - و لو كان يدخل بهما فقال امرأتي طالق امرأتي طالق كان له ان يوقع الطلاقين على احدهما *

908 ٩٠٨ امرأة قالت لزوجها طلقني فقال فعلت طلقت - فان قالت زدني فقال فعلت طلقت اخرى *

909 ٩٠٩ و لو قالت المرأة لزوجها طلقني ثلثا فقال فعلت او قال طلقت طلقت ثلثا - و لو قال مجيبا لها انت طالق او قال فانت طالق يقع واحدة *

910 ٩١٠ رجل قال لامرأته طلقي نفسك فقالت انا حرام عليك او قالت انا بائن او قالت انا خلية او برية طلقت - كل لفظ يكون من الزوج طلاقا اذا اجابت المرأة بذلك يقع الطلاق *

911 ٩١١ رجل قال لامرأته عمرة بنت مبمح طالق و امرأته عمرة بنت حفص و لا نية له لا تطلق امرأته - فان كان مبمح زوج ام امرأته و كانت تنسب اليه و هي في حجره فقال ذلك و هو يعلم نسب امرأته او لا يعلم طلقت امرأته و لا يصدق قضاء - و فيما بينه و بين الله تعالى لا يقع الطلاق ان كان يعرف نسبها - و ان كان لا يعرف يقع ايضا فيما بينه و بين الله تعالى - و ان نوى امرأته في هذه الوجوه طلقت امرأته في القضاء و فيما بينه و بين الله تعالى *

912 ٩١٢ رجل قال امرأته الحبشية طالق و امرأته ليست بحبشية لا يقع الطلاق *

913 ٩١٣ و لو كان له امرأة بصيرة فقال امرأته هذه العمياء طالق و اشار الى البصيرة تطلق البصيرة و لا تعتبر التسمية و الصفة مع الاشارة *

914 ٩١٤ رجل له امرأتان عمرة و زينب فقال يا زينب فاجابته عمرة فقال انت طالق ثلثا وقع الطلاق على التي اجابت ان كانت امرأته - و ان

٨٩٨ و لو قال فلانة التي اتزوجها غدا فهي طالق و انت يقع الطلاق عليها 898
الساعة و لا يقع على التي يتزوجها *

٨٩٩ و لو قال المرأة التي اتزوجها غدا فهي طالق و انت لا يقع الطلاق 899
على امرأته حتى يتزوجها غدا الا ان ينوي *

٩٠٠ و لو قال كل امرأة اتزوجها فهي و نسائي طوالق وقع الطلاق على 900
نسائه الساعة *

٩٠١ و لو قال لامرأتين له هذه طالق هذه لامرأة له اخرى طلقتا جميعا - و كذا 901
لو قال و هذه او فهذه - و كذا العتق - كذا ذكر في المنتقى *

٩٠٢ رجل قال لامرأته طالق و لم يصم و له امرأة معروفة طلقت امرأته 902
استحسانا - فان قال لي امرأة اخرى و اياها عنيت لا يقبل قوله
الا ان يقيم البينة *

٩٠٣ و لو قال امرأته طالق و له امرأتان كلتاهما معروفتان كان له ان يصرف 903
الطلاق الى ايتهما شاء *

٩٠٤ رجل قال لامرأتي علي الف درهم و له امرأة معروفة فقال لي امرأة 904
اخرى و الدين لها كان القول قوله *

٩٠٥ و لو قال امرأتي طالق و لها علي الف درهم فالطلاق والدين للمعروفة 905
ولا يصدق في الصرف الى غيرها - و كذا لو بدأ[٢] بالمال فقال لامرأتي
علي الف درهم و هي طالق *

٩٠٦ و كذا لو قال امرأتي طالق ثم قال لامرأتي علي الف درهم ثم قال لي 906
امرأة اخرى و اياها عنيت صدق في المال و لا يصدق في الطلاق *

٩٠٧ و لو كان له امرأتان لم يدخل بهما فقال امرأتي طالق امرأتي طالق 907

(٢ ن) ابتدأ *

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٨٨٩ الباب الاول يشتمل على فصول * 889

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٨٩١ رجل قال لامرأته طلقتك او انت مطلقة او شئت طلاقك او رضيت 891
طلاقك او اوقعت عليك الطلاق او قال خذي طلاقك او قال وهبت
لك طلاقك و لم ينو شيئا يقع طلق واحد - و لو قال اردت طلاقك لا يقع *

٨٩٢ امرأة قالت لزوجها قد طلق فلان امرأته فطلقني فقال الزوج فانت 892
اطلق منها فهي طالق - و كذا لو قال فانت اطلق من فلانة *

٨٩٣ رجل قال لامرأته المدخولة انت بائن انت طالق انت بائن ان 893
نوى بالاولى طلاقا فهي ثلاث - و ان لم ينو بالاولى طلاقا يقع ثنتان *

٨٩٤ و لو قال لامرأته انت بائن و فرق القاضي بينهما ثم قال كنت قلت 894
لها امس انت بائن فانه يقع الاولى والثانية ولا يصدق في ابطال
ما اوقعه القاضي *

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و لم يتكلم به يقع الطلاق *

٨٩٦ رجل قال لامرأته كل امرأة انزوجها فهي طالق و انت طالق تطلق امرأته 896
الساعة - و لو قال عنيت به التعليق لا يصدق قضاء *

٨٩٧ و لو قال كل امرأة انزوجها فهي طالق و انت ان نوى وقوع الطلاق عليها 897
للحال يقع و الا فلا - كذا ذكر في المنتقى *

(٢ ن) اما الفصل الاول * (٣ ن) انت اطلقت *

صفحه	مسئله	سطر	غلط	صحیح
۳۹۹	۱۹۹۹	۱۳	او تاخذ بینهما	او تاخذ بینها
۴۰۱	۲۰۱۱	۱۱	و لیس المطیب	و لبس المطیب
۴۰۱	۲۰۱۱	۱۲	لا ینقض	لا ینقص
۴۰۷	۲۰۴۸	۵	تنقضي فیها	تنقضي فیه
۴۰۷	۲۰۴۸	۱۰	لن یصدقها	ان لا یصدقها
۴۰۸	۲۰۵۲	۸	ینقضي فیها العدة	ینقضي فیه العدة

صفحه	مسئله	سطر	غلط	صحیح
۳۶۶	۱۷۸۱	۱۱	و علی ان تجعل	او علی ان تجعل
۳۶۶	۱۷۸۲	۱۴	و لم یسم	و لم تسم
۳۶۹	۱۷۹۵	۸	ثلثه آلاف درهم	ثلثة آلاف درهم
۳۷۱	۱۸۰۴	۳	لامرأنه	لامرأة
۳۷۴	۱۸۲۴	۲۱	فالبراءة فیه جائزة علی الوفاء	فالبراءة فیه جائزة بالشرط علی الوفاء
۳۷۶	۱۸۳۱	۹	و ذکر الحصاف	و ذکر الخصاف
۳۷۸	۱۸۵۴	۱۶	کان مظاهر	کان مظاهرا
۳۸۱	۱۸۷۴	۱۳	ثم تزوجما	ثم تزوجها
۳۸۲	۱۸۷۷	۱	خطر الجماع	حظر الجماع
۳۸۲	۱۸۷۷	۲	خطر الجماع	حظر الجماع
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كتاب النكاح الى آخر باب النفقة

وكتاب الطلاق الى آخر فصل النسب

من فتاوى قاضيخان للقاضي العلامة فخر الملة والدين

الحسن بن المنصور بن محمود الاوزجندي تغمده الله بالرحمة و الرضوان

بتصحيح العالمين الكاملين المولوي ولايت حسين مدرس المدرسة العالية

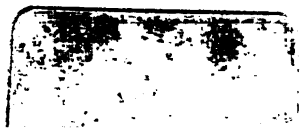
و المولوي محمد يوسف وكيل العدالة العالية هايكورت حفظهما الله تعالى

عن نوائب الزمان و حوادث الدوران

طبع على نمط حسن في مطبع بپتست ميشن الواقع في دارالامارة

كلكته

لكونه جزءً من اجزاء ٹيكر لكچر

سنة ١٣١٢ هجري مطابق سنة ١٨٩٥ عيسوي

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